IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 275.

The Oregon Railway and Navigation Company,

Plaintiff in Error,

vs.

The Oregonian Railway Company, Limited.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

THE OREGON RAILWAY AND NAVIGATION COMPANY, PLAINTIFF IN ERROR,

vs.

THE OREGONIAN RAILWAY COMPANY, LIMITED, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Brief and Argument for Plaintiff in Error.

STATEMENT.

This action was brought by the Oregonian Railway Company, Limited, alleged to be a corporation formed in Great Britain under the Companies' Act of 1862, against the Oregon Railway and Navigation Company, a corporation formed under the general laws of Oregon, to recover $68,131, alleged to be due the plaintiff as rent for the half year commencing May 15, 1884, upon a lease of its railroad in Oregon.

The issues upon which the case was tried in the court below were raised by the amended complaint of the plaintiff and the third amended answer of the defendant.

It is alleged in the amended complaint filed August 15, 1884, that the plaintiff became a corporation on April 30, 1880, by certain persons making and entering into, under the Companies' Act aforesaid and the acts supplementary thereto and amendatory thereof, a memorandum of association, which is set forth at length, (Record, folio 23, p. 13, to folio 29, p. 16, inclusive,) and by entering into articles of association, which are also set out at length, and delivering the same to the registrar of joint stock companies at Dundee, Scotland, as required by said act, and by the registration of said memorandum and articles of association and the certification by said registrar, under his hand, of the said "The Oregonian Railway Company, Limited," to be incorporated. (See Record, folio 30, p. 17.)

That said corporation has a registered office in Dundee, Scotland, and owns a railroad in the State of Oregon and transacts business in Oregon, and has duly complied with the laws of the State of Oregon for the regulation of foreign corporations doing business therein.

That the defendant became a corporation under the laws of Oregon on June 13, 1879, by making and filing articles of incorporation, which are set forth at length (see Record, folio 67, p. 42, to folio 69, p. 48); that its principal place of business is at the city of Portland, Oregon, and its powers, duties, rights, and franchises are set forth in its articles of incorporation. A statement of the business of the corporation in the articles includes, among other things, "to purchase or consolidate with or lease or operate and maintain, on such terms as may be agreed upon," any railroad in Oregon.

That on August 1st, 1881, the plaintiff was the owner of a certain railroad in Oregon, and then demised the same to defendant by an instrument in writing for the term of ninety-six years at a yearly rent of 28,000 pounds sterling, payable in half-yearly installments in advance; that the defendant, by its officers, duly executed said instrument,

being thereunto duly authorized by a vote of the directors of the company; and that defendant thereupon entered into possession of said railway and operated the same until May 15, 1884, when, pretending that neither party to said lease was authorized to execute the same, it offered to restore the demised property to the plaintiff, but not in as good condition as when received by the defendant, which offer the plaintiff refused to accept, and thereupon, to prevent loss and injury that might result from discontinuing the operation of the road, it was agreed that the defendant should retain possession thereof, and continue to operate the same, during six months thereafter, but neither such agreement nor the action of either party thereunder was to prejudice its claim as to the validity of said lease or affects its rights in the premises; that the defendant has failed and refused to pay the installment of rent falling due on May 15, 1884. (Record, folios 69 and 70; pp. 48 and 49.)

By the last amended answer the defendant:

1. Denies that the plaintiff was, at any time, or is a corporation created or existing under an act of Parliament of the United Kingdom of Great Britain and Ireland, known as the Companies' Act of 1862, or is a corporation at all. (Record, folio 115, p. 72.)

2. Alleges that there are no other or further provisions of said act, or of any act of said Parliament or law of said Kingdom, than set forth in the complaint, relating to the powers of corporations created or existing under the laws of said Kingdom, and denies that said laws, or any other law of Great Britain, confers on the plaintiff power to lease its railroad property or franchise. (Record, folios 115 and 116, p. 72.)

3. Denies knowledge or information sufficient to form a belief as to whether a "Memorandum of Association" was made and entered into in pursuance of said Companies' Act, or at all; or as to whether any "Articles of Associa-

tion" were made, entered into, or delivered for registry, as alleged in the complaint, in pursuance of said Companies' Act, or at all; or as to whether the plaintiff had a registered office at Dundee, Scotland, or elsewhere, or transacted business in the State of Oregon, or had complied with the laws of said State for the regulation of foreign corporations doing business therein. (Record, folios 110 and 117, pages 72 and '73.)

4. Denies that the plaintiff became or is vested with the rights, powers, privileges or franchises to purchase, construct, operate, lease or sell any railroad in Oregon; or that the plaintiff became or is an incorporated company, or had or has any rights, powers, privileges, or franchises mentioned in said alleged memorandum or articles of association, or is authorized to transact business in the State of Oregon or elsewhere, or owns a railroad in said State. (Record, folio 117, page 73.)

5. Admits that it was during the times mentioned in the complaint a corporation duly incorporated under the laws of the State of Oregon, but denies that it ever had or has any power, right, or franchise to purchase, or lease any railroad or railroads in the State of Oregon, and further denies that at any time plaintiff demised unto it the railway or railroad in the complaint mentioned; admits that the president and assistant secretary of the defendant signed the paper and writing relied upon by plaintiff as a lease, and affixed thereto defendant's corporate seal; and alleges that neither of such officers of the defendant had authority to execute on behalf of the defendant such writing or indenture of lease, in that neither plaintiff nor defendant was at any time empowered or authorized to execute such writing, or to enter into any indenture of leasing; that the State of Oregon did not authorize or consent to such leasing by plaintiff or taking in lease by defendant; that no special or other law had at any time been enacted by said State conferring such authority on either

of the parties hereto, or purporting so to do or relating thereto; that the stockholders of the defendant did not at any time authorize or assent to such, or any contract of leasing, and the said "pretended lease was and is unauthorized and void." (Record, folio 118, p. 73.)

6. Admits that the defendant upon the execution of said lease entered into possession of said road, and so continued till the 15th of May, 1884, but denies that since said date it had been or is in possession of said road under said pretended lease or otherwise than at the special request of plaintiff for its accommodation, and solely to prevent loss which otherwise might result to plaintiff from discontinuing the operation of such road, and in accordance with the written memorandum of agreement set forth in the complaint. (Record, folio 118 and 119, p. 74.)

7. Denies that any sum of money whatever is due or unpaid to plaintiff from defendant, or that at the time of tendering and offering to restore said property the same was not in equally good condition as to repair, equipment, or value as when received by defendant, and avers "that it has fully paid the rental provided for in said lease" for the period during which it held said railway, to wit, for the term ending May 14, 1884. (Record, folio 119, p. 74.)

And for a further and separate defense the defendant alleged in said answer, in substance, that the railroad or railroads which "defendant was and is organized to construct and operate, and the termini of which are specified in the articles of association," are east of Portland, and do not embrace the railway alleged to have been demised to the defendant, nor any one to the south of said city, and that the railroad mentioned in said lease, and purporting to be demised thereby, is a wholly different road, forming no part and having no near connection with or relation to the road or system of roads the termini of which are mentioned in any of the articles of association of the defendant, and that prior to the execution thereof "the

capital of the defendant had been contributed and applied in the construction and equipment of a railroad or railroads the termini of which were specified" in its articles of association; that said lease was never authorized or assented to by the stockholders of the defendant, and that the act of the defendant's officers in seeking to bind defendant to said pretended indenture of lease was a wholly unauthorized attempt to divert and subject the capital of defendant to a wholly new object and enterprise not contemplated when said capital was contributed. (See Record, folio 117 and 120, p. 74.)

The plaintiff in the court below demurred to this answer—

First. To so much thereof as "denies the corporate existence, due organization of the plaintiff as a corporation, or facts relating to the organization of the plaintiff as a corporation, or which pleads to or questions or denies compliance by plaintiff with foreign or domestic law, or which attempts to deny the demise alleged in the amended complaint by plaintiff to defendant, and also to so much" * * * "as pleads to or denies, or attempts to plead to or deny, or questions the powers, rights, privileges, franchises, or ownership of plaintiff alleged in the amended complaint herein, for the reason that said defendant ought not to be allowed or heard to say or allege that the plaintiff is not a corporation or has no power to make the contract herein sued on, or to make any denials contrary to defendant's own acknowledgment and deed of about August 1, 1884."

Second. To so much thereof "as by plea attempts to set up want of power and authority in defendant corporation and its officers to enter into the contract alleged in the amended complaint, and for cause of demurrer thereto says that upon the face of the matter alleged in said plea, it appears that the same does not constitute a defense or counter-claim to said action;" and

Third. To the further and separate defense set forth in said answer, "for the reason that the new matter therein set up does not constitute a defense of counter-claim to this action." (Record, folio 123, p. 81.)

Plaintiff also moved to strike out of the answer:

1. The admission that the defendant entered into possession of the railway under the alleged lease, coupled with the denial that the possession had been held thereunder since May 15, 1884.

2. The allegation of payment of rent during the time defendant held under the lease, and up to May 15, 1884, and the denial that at the time the defendant offered to restore the road to the plaintiff, it was not in as good condition as when received by the plaintiff, as frivolous and irrelevant.

3. The admission that the defendant is and was a corporation under the laws of Oregon, coupled with the denial that it ever had the power to purchase or lease a railroad in Oregon, because the admission is redundant and a denial sham and frivolous.

4. "The rest and residue" of the answer not demurred to and not included in the former portions of the motion to strike out "for the reason that such residue is wholly immaterial and irrelevant to the issues in the cause." (Record, folio 125, p. 82.)

The court allowed the motion to strike out as a whole, and sustained the demurrer, and rendered judgment in favor of the plaintiff against the defendant for the sum of $68,131, with 8 per cent. interest from May 15, 1884, amounting to $72,715.43, and costs and disbursements, taxed at $579.17. (See Record, folio 127½, p. 83.)

Assignment of Errors.

First. The Court erred in sustaining the demurrer of the plaintiff to the last amended answer and to each portion thereof demurred to.

Second. The Court erred in allowing the motion of plaintiff to strike out portions of said answer.

Third. The Court erred in rendering judgment in favor of the plaintiff against the defendant.

Argument.

Before proceeding to discuss the more important questions in the case, the attention of the Court is directed to the following question of practice:

The plaintiff in error claims that the Court erred in sustaining the demurrer to last amended answer and rendering judgment thereon, for the reason that: A demurrer to an answer containing denials of material allegations in the complaint, on the ground that the defendant is estopped to deny such allegations, is not authorized by the Civil Code of Oregon, which regulates the practice in actions at law in the United States courts in that State.

Section 71 of the Oregon Code provides:

"The answer of the defendant shall contain—

"1. A specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

"2. A statement of any new matter constituting a defense or counter claim, in ordinary and concise language, without repetition."

Section 76 provides:

"The plaintiff may demur to an answer containing new matter when it appears upon the face thereof that such new matter does not constitute a defense or counter-claim, or he may for like cause demur to one or more of such defenses or counter-claims, and reply to the residue."

It will be seen that a demurrer is authorized only to an answer containing new matter, and that a separate demurrer to the portion of an answer containing denials only is unauthorized.

If an answer is sham, frivolous, or irrelevant, it may be stricken out, on motion, under section 74 of the Code. If the denials are insufficient to raise an issue of fact, I suppose a motion for judgment upon the pleadings would lie; but if the plaintiff in this case desired to take advantage of the supposed estoppel of the defendant, such estoppel should have been set up by reply.

But if the demurrer were authorized by the Oregon Code, it is further claimed that the court erred in holding that the defendant was estopped to deny the incorporation and organization and want of power of the plaintiff to make the contract sued on. In cases where the defendant is held to be estopped to deny the incorporation of the plaintiff, and its power to make the contract sued on, allegations of such facts are not required in the complaint. (National Insurance Co. *vs.* Bowman, 60 Mo., 252.) But a foreign corporation suing in the courts of this country must set forth in its complaint the fact that it is a corporation and the manner in which it became such. If the allegations cannot be controverted this is useless.

The reasons for holding a party contracting with a corporation estopped to deny its corporate existence do not hold in the case of a foreign corporation.

The party contracting with such a corporation has not the means or opportunity of ascertaining whether it is in fact a corporation or is duly organized as he has in the case of a domestic corporation, and no proceeding in our courts can be maintained to inquire into the legality of such foreign corporation or the validity of its organization.

Passing over these technical questions, I come to the consideration of the questions raised by the demurrer to the answer, which go to the merits of the controversy, and which are as follows:

1. *Was the plaintiff in the court below authorized by its foreign charter or the laws of Oregon to enter into the contract set up in the complaint?*

2. *Was the defendant in the court below authorized to enter into the contract set up in the complaint?*

3. *Does the act of the President and Secretary of the Oregon Railway and Navigation Company, assuming to act for that company in signing the lease set up in the complaint, estop it from showing want of power in the lessor to execute said lease?*

4. *Is the Oregon Railway and Navigation Company, by the act of its President and Secretary, in assuming to execute for it the lease set up in the complaint, estopped to deny that the hiring of said railroad was not within the scope of its corporate powers?*

These questions will be discussed in the order stated.

1. *Was the plaintiff in the court below, the Oregonian Railway Company, Limited, authorized by its foreign charter or the laws of Oregon to enter into the contract set up in the complaint?*

It is settled by the decisions of this Court, that "unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot by lease or other contract turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises and the exercise of its powers, nor can any other railroad company without similar authority make a contract to receive and operate such, road, franchises and property of the first corporation, and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter.

Penn'a Co. *vs.* St. Louis, Alton, &c., R. R., 118 U. S., 290.

Green Bay & Minnesota R. R. Co. *vs.* Union Steamboat Co., 107 U. S., 98.

Thomas *vs.* R. R. Co., 101 U. S., 71.

Pierce *vs.* Madison & Indianapolis R. R. Co., 21 How., 441.

New York & Md. Line R. R. Co. *vs.* Winans, 17 How., 30.

Laken *vs.* Railroad Co., 13 Oregon, 436.
See also Davis *vs.* Old Colony R. R. Co., 131 Mass., 258.
Eastern Counties Ry. *vs.* Hawkes, 5 H. S. Cas., 331, 371 to 381.
Ashbury Ry. Carriage & Iron Co. *vs.* Ritchie, L. R., 7 H. L., 653.
McGregor *vs.* Dover & Deal Ry., 12 Q. B., 618.
East Anglican Ry. *vs.* Eastern Counties Ry., 11 C. B., 757.

No such powers had been given to the parties to this transaction.

To ascertain whether the plaintiff had power, under its charter and the laws of Oregon, to make the contract in question, it is necessary to consider the provision contained in the Constitution of the State concerning the formation of corporations, the provisions which have been made by law for the formation of domestic corporations, and for the transaction of business in the State by foreign corporations, incorporated for the purpose of constructing and operating railroads.

The Constitution (art. 2, sec. 2) provides:

"Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested or corporate rights."

On October 11, 1862, the Legislative Assembly passed a general law providing for the formation of private corporations. Section 1 (see Code of 1874) provides that any three or more persons may incorporate themselves "for the purpose of engaging in lawful enterprise, business, pursuit, or occupation," in the manner provided in section 2.

Section 2 provides that such persons, to become incorporated, shall make, subscribe, and file with the Secretary

of State and the clerk of the county in which the business of the corporation is proposed to be carried on, written articles of incorporation; and section 4 provides: That "the articles of incorporation shall specify"— * * *

"2. The enterprise, business, pursuit, or occupation in which the corporation proposes to engage. * * *

"6. If the corporation is formed for the purpose of navigating any stream or other water, or making or constructing any railroad, macadamized road, plank road, clay road, canal or bridge, the termini of such navigation, road, canal, or the site of such bridge."

Section 5, as amended in 1878, provides that—

"Upon making and filing the articles of incorporation, as herein provided, the persons subscribing the same are incorporators, and authorized to carry into effect the objects specified in the articles in the manner provided in this chapter, and they and their successors, associates, and assigns, by the name assumed in such article, shall thereafter be deemed a body corporate, with power: * * *

"1. To sue and be sued. * * *

"4. To purchase, possess, and dispose of such real and personal property as may be necessary and convenient to carry into effect the objects of the incorporation, and to take, hold, and possess, and dispose of all real and personal property donated to such corporation by the United States, or by any State, Territory, county, city, or other municipal corporation, or any person, firm, association, or private corporation, for the purpose of aiding in the objects of such corporation." * * *

Section 17 of said act, as amended in 1878, is as follows:

"All corporations that expire by the limitations specified in their articles of incorporation, or are dissolved by virtue of the provisions of section 19 of this act, or are annulled by forfeiture or other cause, by a judgment of a court, continue to exist as bodies corporate for a period of five years

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* This section was amended at the session of the Oregon Legislature, held in January, 1887, so as to authorize a railroad corporation to lease its road to another company. (See Session Laws of 1887, p. 14.) (A copy of the section as amended (the amendment being in italics) is printed as an appendix hereto.)

thereafter, if necessary for the purpose of prosecuting or defending actions, suits, or proceedings by or against them, settling their business, disposing of their property, and dividing their capital stock, but not for the purpose of continuing their corporate business."

Section 19 is as follows:

"Any corporation organized under the provisions of this chapter may, at any meeting of the stockholders which is called for such purpose by a vote of the majority of the stock of such corporation, increase or diminish its capital stock or the amount of the shares thereof, or authorize the dissolution of such corporation and the settling of its business and disposing of its property, and dividing its capital stock in any manner it may see proper."

By an act approved October 21, 1878, entitled "An act to authorize foreign corporations to do business and exercise their corporate powers within the State of Oregon," the defendant in error claims to have been authorized to execute the lease in question. Said act consists of two sections, of which the following is a copy:

*"SEC. 1. That any foreign corporation incorporated for the purpose of *constructing, or constrcting and operating, or for the purpose of or with the power of acquiring and operating, any railway*, macadamized road, plank road, clay road, canal or bridge, or for the purpose of conducting water, gas or other substance by means of pipes laid under the ground, shall, on compliance with the laws of this State for the regulation of foreign corporations transacting business therein, have the same rights, powers and privileges in the exercise of the rights of eminent domain, collection of tolls and other prerogative franchises as are given by the laws of this State to corporations organized within this State, *for the purpoes of constructing any railway*, macadamized road, plank road, clay road, canal or bridge, or for the purpose of conducting water by means of pipes laid under the surface of the ground.

*This act was amended at the session of the Oregon Legislature of January, 1887, so as to authorize a foreign corporation, specified in the act, to exercise the powers of a domestic corporation. (See Session Laws of 1887.) (A copy of the amendatory act (the amendments being in italics) is printed as an appendix hereto.)

"SEC. 2. Nothing in this act contained shall be so construed as to give to any foreign corporation or corporations any other or further rights, powers or privileges than may be acquired or exercised by corporations incorporated under the laws of this State; but only so as to give to foreign corporations the same rights, powers and privileges, on a compliance with the laws of this State, as may be acquired or exercised by corporations incorporated under the laws of this State."

Did this act confer on the Oregonian Railway Company, Limited, power to execute the contract set up in the complaint?

That company is a foreign corporation organized, not for the purpose of transacting any business, or with power to transact any business, in the country where it claims to have been incorporated and organized, but in North America, and principally in the State of Oregon.

It is too well settled by the decisions of the courts of this country to require argument, that a corporation has no existence except in the country of its incorporation, but it may by comity be permitted to perform through agents in other States such ordinary and general business as individuals might perform. This comity may be denied them by the legislative power, and a foreign corporation, absolutely or under such conditions as the legislative power chooses to impose, may be prohibited from transacting business in such States. In the State of Oregon foreign corporations of the character mentioned in the act of October 21, 1878, are authorized (the act being constitutional) *to transact certain business* and have conferred upon them *certain rights, powers, and privileges.* The enumeration of these rights, powers, and privileges in the act implies the *exclusion of all others.* The maxim *expressio unius, etc.*, is applicable.

What are the foreign corporations embraced in this act? They are those, and only those, incorporated for the purpose of "constructing," "constructing and operating," or for the purpose of "acquiring and operating," any railway

or other road, &c., mentioned in the act. If the letting of a railroad, a single transaction, is a "*business pursuit or occupation*," within the meaning of section four of the Oregon act providing for the formation of private corporations, as was assumed by the court below, then a corporation incorporated, among other things, for leasing its railroad when constructed is not authorized under that act to transact that portion of its business in the State of Oregon, because it is not included in, or necessary to the business of, "constructing," "constructing and operating," or "acquiring and operating" a railroad."

What are the "rights, powers, aad privileges" which such foreign corporations have under said act? Not the same "rights, powers, and privileges" as domestic corporations formed for like purposes, as was assumed by the court below, but "the same rights, powers, and privileges" *in the exercise of the rights of eminent domain, collection of tolls, and other * * * franchises*, as are given by the laws of the State to corporations organized within the State *for the purpose of "constructing" any railway*, &c. I omit the word "prerogative," because, if it has any meaning, it is used restrictively, and may be omitted without impairing the force of the argument. If we assume that the word "constructing," where it here refers to domestic corporations, is equivalent to "constructing and operating," still the grant of powers is such only as are necessary to the exercise of the franchises mentioned.

In Morgan *vs.* Louisiana, 93 U. S., 217, the court say:

"The franchises of a railroad corporation are rights or privileges which are essential to the operation of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road or water for its engines, and the like."

These are the franchises that are included in the expression, "other prerogative franchises," in this statute. The

power to make a lease of its railroad is not necessary to the enjoyment of these franchises, nor is it necessary to the business of the "constructing," "constructing and operating," or the "acquiring and operating" of a railroad.

The power to make a lease of its railroad in Oregon not being included in the business which foreign corporations are authorized by the act in question to transact in Oregon, and not being included in the powers, rights, and privileges conferred upon such corporations, because not necessary to the exercise of the franchises of such corporations, it follows that the making of the contract set up in the complaint by the Oregonian Company was prohibited by implication, and is illegal and void.

In Railroad Companies *vs.* Gaines (97 U. S., 697) a grant of "powers, rights, and privileges" was held to be thus restricted by the business the corporation was authorized to transact. The privilege of exemption from taxation had been granted to the Nashville and Chattanooga Railroad Company in its original charter. The Court, in construing section 58 of the charter of the Knoxville and Charleston R. R. Co.—which is as follows:

"The said company is hereby invested, for the purpose of making and using said road, with *all the powers, rights, and privileges*, and subject to all the disabilities and restrictions that have been *conferred and imposed upon the Nashvillle and Chattanooga Railroad Company* in its original charter"—

said that the grant here was "*not of all the rights and privileges of the Nashville and Chattanooga Company, but of such as were necessary for the purpose of making and using the road,* or, in other words, the franchises of the company, which do not include immunity from taxation."

But suppose, for the sake of the argument, that by the act in question there was conferred upon the Oregonian Railway Company, Limited, all the powers possessed by domestic corporations incorporated for like purposes, I still contend that it had no power or authority to let its railroad.

The power to make a lease of its railroad is not conferred upon a domestic railroad corporation by the general incorporation act of Oregon.

"The powers of corporations organized under legislative statutes are such and such only as those statutes confer."
* * *
"The charter of a corporation is the measure of its powers, and the enumeration of these powers implies the exclusion of all others."

Thomas *vs.* Ry. Co., 101 U. S., 71.
Marion Savings Bank *vs.* Dunkin, 54 Ala., 473, and cases cited.

It will not be claimed that any statute of the State expressly authorizes such a lease. The authority, if it exists at all, is found in subdivision 4 of section 5, or in sections 17 and 19 of the general law, hereinbefore set forth. Subdivision 4 of section 5 empowers a corporation "to purchase, possess, and dispose of such real and personal property as may be necessary and convenient to carry into effect the object of the corporation," &c. A corporation formed for the purpose of buying and selling goods would probably, under this subdivision, have power to buy and sell such personal property at pleasure, because that would be necessary and convenient to carry into effect the object of its incorporation.

Possibly the same may be true in regard to a corporation formed for the purpose of dealing in real property. But *a railroad company incorporated under this act, as such*, would have power only to purchase and hold real or personal estate *necessary and convenient for the construction and operation of its road;* and the better construction, I think, would be that it could *only sell it when no longer necessary for that purpose*, without complying with the provisions of section 19 of the act, which, as we shall hereafter see, contemplates a dissolution of the corporation when it disposes of its property.

In the case of Coe. *vs.* Columbus, Piqua and Indiana R. R. Co., *et. al.*, 10 Ohio State Repts., this precise question came before the Supreme Court of Ohio: A railroad company was authorized "to acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the object of the corporation." The court held that "like any other general words they must be restrained into the fitness of the matter," and that such language did not authorize the sale, mortgage, or lease of the real or personal estate which was necessary for the purpose of maintaining and operating the railroad.

But let us suppose for the purposes of the argument that this subdivision does confer the power upon a railroad company to dispose of all its property. Such a power could not be construed to authorize it to dispose of its property by leasing it to another company for a term of years, as that would be, as we shall see directly, clearly incompatible with the provisions of sections 16, 17, and 19 of the act.

The power of alienation conferred upon corporations by this subdivision is a power to dispose of *property*, as distinguished from *franchises*, and it may be admitted that the property the corporation is here authorized to dispose of, whatever that may be, may be sold, absolutely, or mortgaged, as a mortgage is only a qualified or conditional sale; but the question whether such power of disposition *authorizes a railroad company to make a lease of its railroad*, will be discussed hereafter.

His Honor, Judge Deady, in his opinion, assuming that a railroad company may lease its property unless prohibited by some positive statutory enactment, says:

"The idea of such restraint is also incompatible with the provisions of the corporation act, sec. 17. That, in effect, authorizes a railroad corporation to terminate its existence at its option and dispose of its road."

Section 19 must have been intended. By reference to section 19 it will be seen that it authorizes a railroad corporation to dispose of its road only in connection with "the dissolution of such corporation and the settling of its business * * and dividing its capital stock." And section 17, as amended by the act of October 21, 1878, provides only that corporations "dissolved by virtue of section 19, * * annulled by forfeiture or other cause by judgment of a court, continue to exist * * for a period of five years thereafter, if necessary for the purpose * * of settling their business, disposing of their property, and dividing their capital stock."

These sections, so far from conferring authority upon an Oregon railroad corporation to let its road to another company for a period of 96 years, or for any other period, or being incompatible with the idea that such lease is unauthorized by the laws of the State, authorize, in my judgment, nothing but an absolute sale and transfer of the property of the corporation, so that, with the possession of the property, the transferee becomes the owner of the property and becomes subject to all the duties and liabilities toward the State, the public, and individuals which attach to the *ownership, possession, operation and management of such property when united in one person;* and said sections contemplate that such transfer shall be made contemporaneous with the dissolution of the corporation.

Besides, the transfer authorized by section 19, and referred to in section 17, can only be authorized at a stockholders' meeting, and then by a vote of a majority of the stock of such corporation. It is not pretended that such authority existed for the execution of the contract set forth in the complaint. On the contrary, it is expressly averred that it was not so authorized in the answer of the defendant.

So far, therefore, from section 19 being incompatible with the idea that a domestic railroad corporation in

Oregon does not possess power to dispose of its railroad and franchises by lease, it is, in itself, a denial of such power, because the circumstances under which and the manner by which the property of such a corporation may be disposed of are specified in the section, and such provisions are incompatible with the existence of power to power to lease its property for a term of years.

It follows that the power to execute a lease is denied to such a corporation unless conferred by some other express provision in the statute, which would overrule the otherwise controlling implication of the sections referred to.

The making of a special provision in this section for the disposition of the property of a corporation is inconsistent with the idea that power to dipose of all its property is conferred upon a railroad corporation by any other portion of the act.

The words "dispose of," in subdivision 4, of section 5, *supra*, must be held to be equivalent only to the word "sell," and cannot, by any fair construction, be held to authorize the execution of such contract as that which forms the subject-matter of this action—a contract by which a foreign corporation, domiciled in a foreign country, holding and operating a railroad in Oregon by permission of the State, leases its railroad and the franchises necessary to its operation for a period of ninety-six years, thus disabling itself from performing those functions which it had undertaken to perform, and retires with all its agents beyond the seas, but still remains the owner of the property and of the franchises granted to it upon consideration of their exercise.

A contract so obviously against public policy, (see Thomas *vs.* R. R. Co., 101 U. S., 71,) unless expressly authorized by statute or by necessary implication, will not be enforced, and the authority to make it will not be implied from a grant of power to a corporation to sell prop-

erty no longer necessary for the objects of its incorporation, or to dispose of all its property absolutely upon disincorporating and winding up its business.

The reasons for holding such a contract void on the ground of public policy do not exist in the case of an absolute sale, voluntary or involuntary, of all the property of such a corporation to another corporation formed under the same general law, as, in the latter case, the ownership of the property and the management of the same would be vested in the same corporation, with all the rights and powers and subject to all the liabilities of the former owner, *while the corporation disposing of the property by ceasing to transact business would cease to be a corporation* under the provisions of section 16 of said act, which provides *that if any corporation organized under it shall, "for any period of six months after the commencement of its business, neglect and cease to carry on the same, its corporate powers shall also cease."*

The proposition that a domestic railroad corporation in Oregon may transfer all its property to another company by lease for a term of years, reserving an annual rent, cease to transact the business, pursuit, or occupation for which it was incorporated, and transact no business except the collection of rent for its property and the distribution of it in dividends to its stockholders, is incompatible with the provision of section 16 of the general incorporation law, quoted above, *which attempts to secure the due performance by the corporation of its functions in consideration of the grant of its franchises, and provides for a forfeiture of such franchises ipso facto whenever such corporation shall cease to exercise them for a period of six months.*

But it is contended that the lettiag of its road is described in the articles of incorporation of the Oregonian Company as its business in part, and that by specifying in its articles the power to let its road as a portion of the business which it proposes to

transact, it has acquired the power to do so. Upon this point the learned judge who tried this cause in the court below fell into an error by confounding the *power* of a corporation to perform a single act, (such as the execution of a lease by a railroad company transferring the control of its entire property for a term of years, and thus *disabling itself from transacting the business* for which it was formed,) with the *business* of a corporation as that term is used in section 1 and in subdivision 2 of section 4 of the Oregon law, *supra.*

In a broad sense, making a lease is business, but not such a business as is intended where the term is used in the Oregon act with reference to the enterprise, pursuit, or occupation in which a corporation proposes to engage.

Subdivision 2 of section 4, as we have seen, requires the corporators to state in their articles of incorporation "the enterprise, business, pursuit, or occupation in which the corporation proposes to engage." Sec. 5 of said act enumerates the powers which all corporations, for whatever purpose incorporated, may exercise. The power of a corporation to dispose of its property must, as we have already seen, be found under secs. 5 and 19 of the act.

By "business" under this law is meant the ultimate thing to be done in the exercise of the corporate franchises, such as "constructing" a railroad, "constructing and operating" a railroad, the business which foreign corporations are authorized to transact in Oregon by the act of October 21, 1878. The selling, mortgaging, transferring, or leasing a franchise to transact a business for which the corporation is formed cannot be the business of the corporation. The power to sell, mortgage, and lease is a matter wholly distinct from its business, by which is meant the ultimate end of its creation.

The object of requiring corporations to be formed under general laws is undoubtedly to prevent the granting of

special favors to particular corporations and to secure a uniformity of rights and powers in dealing with the corporate property. But if a corporation can acquire a special power not granted to all corporations under the general law by enumerating such power in its articles of incorporation as a business to be transacted, the object of the Constitution would be frustrated, and there would be, in the course of time, corporations with as diverse powers as exist where they are formed at will by private legislative acts, and the measure of their power determined by the caprice of the legislative body.

That the powers of an Oregon corporation are to be found only in the statute, and that there is no Oregon statute authorizing the lease of a railroad has been decided by the Supreme Court of that State.

In the case of Lakin *vs.* Railroad Company, 13 Oregon, 436, the Supreme Court of Oregon held that a railway corporation, organized under the corporation law of that State, has no powers other than the statute confers and such as are incidental to its existence.

That case was an action to recover damages for personal injuries, resulting in death, alleged to have been caused by the negligence of the defendant and its agents. The defendant set up that at the time of the accident another company, the Oregon Pacific Railroad Company, was engaged in constructing the line of road mentioned in the complaint under a construction contract, and was still in possession of and operating the road. The court said:

"In this State the right to be incorporated is secured by a general law, and any persons may avail themselves of it by complying with its provisions. Under this general law the corporation defendant was organized, and possessed no other powers or functions than the statute creating it confers on such as are incidental to its existence." * * *

"It is regarded as settled that where one railroad company is authorized by law to contract or lease the road

to another company it is not responsible for the torts committed by the other company in the running of its trains or the management of its road." * * *

"It does not appear that the defendant had leased its road to the Oregon Pacific Company, and if it had, as there is no special statutory authority for it, the effect, as we have seen, would not have been to rid the defendant of its obligation to the public or to escape the liability for torts committed by such lease."

If, as I have attempted to show, a domestic railroad corporation incorporated under the general incorporation laws of Oregon, is not authorized to let its railroad for a term of years, and cannot neglect for a period of six months to transact the business for which it was incorporated, without losing its powers, then, although the foreign charter of the Oregonian Company may have contained the equivalent to a declaration that a part of the business of the company was to let its road, as it could exercise in Oregon no greater powers than a domestic railroad corporation, such declaration and confers no power upon the corporation.

His Honor, Judge Deady, referring to the act October 22, 1880, says:

"The effect of this act is clearly to establish, so far as the State and this court are concerned, the legal right of the plaintiff to construct, own, and operate this road, and, in my judgment, to dispose of it either absolutely or for a term of years."

In my judgment, an inspection of this act will show that such a construction of the act is wholly unwarranted, and that no such effect can be given to it. If the company was not in fact a corporation, as I shall undertake to show hereafter, the Legislative Assembly of Oregon could not by any enactment make it such, nor could it by a special law be authorized to exercise the franchises of domestic railroad corporations in fact, being prohibited by the constitutional provisions hereinbefore set forth. By the act

in question, the Legislature of Oregon undertook to grant to the company "and to its assigns, and owners and operators of the railway now being constructed by it," a public levee in the city of Portland, the fee of which was held by the city, and certain rights of way upon the streets of Portland and over State lands.

The act neither empowers the company to transfer its property or franchise, nor implies the existence of a present power to sell or assign, but, recognizing the possibility of a change of ownership in the future, either under future legislation or by operation of law, undertakes simply to provide that, whoever does own or operate the road shall have the benefit of this grant.

To this end it is provided that the company and "its assigns shall have *no* power to sell, convey or assign the premises or rights granted," * * * "save only with and as part and parcel of and as appurtenant to the railway now built and owned by said company and now in process of construction by it."

This language must be construed with reference to the subject-matter of the act and the manifest intention of the Legislature. Examined in connection with its context and the subject-matter, it will be seen that the Legislative Assembly was not considering or legislating concerning the power of the company to transfer its road or property, but granting to it valuable rights, to be used for the public benefit, and attempting to prevent them being diverted from the object for which they were made.

The language quoted, instead of being intended as a *grant* of powers, was intended as a *prohibition* against the alienation of the property granted by the act, so that it should no longer be used for the purposes for which it was granted, and the public thus be deprived of the benefit of the property. The act in this respect is not very dissimilar from the one relied upon for a like purpose in Thomas

vs. Railroad Company, 101 U. S., 71, and upon this point the language of Mr. Justice Miller in that case is in point. Referring to an act of the State of New Jersey, providing that it should be "unlawful for the directors, lessees or agents of said railroad (Millville & Glassborough R. R. Co.) to charge more than three and a half cents per mile for carrying passengers," &c., which was claimed to be a ratification of the lease of a railroad to said company, he said:

"The Legislature was determined that whoever did run the road and exercise the franchise conferred on the company, and under whatever claim or right this was done, should be bound by the rates of fare established by the act. Hence, without undertaking to decide in whom was the right to the control of the road, language was used which included the directors, lessees, and agents of the road."

In Penn. Co. *vs.* St. Louis, Alton, &c., R. R., *supra*, a statute of Indiana that provided that in cases where a railroad had been leased, conveyed, or mortgaged to another railroad company, and was in possession of such company, it should be assessed for taxation to that company, was held to neither imply that such leases were lawful nor that the lease was authorized by law.

But if the act under consideration could be construed into a grant of power to the Oregonian Company to "sell, convey, or assign" its road, the power must still be exercised, if at all, *in the manner and subject to the conditions provided in the general incorporation law. A sale, conveyance, or assignment of all its property would be authorized only in connection with a surrender or forfeiture of its powers as a corporation.*

Again, the power to sell and convey would not include the power to transfer all of its property by lease for a term of years, as I have already attempted to show in considering the power of alienation conferred upon domestic corporations by the general law.

If it appeared that, by the act in question, the Legislature of Oregon attempted to create the Oregonian Railway Company, Limited, a corporation, or to confer upon it corporate powers not already possessed under the general laws referred to, to that extent the act would be clearly unconstitutional and void.

The constitution of California, so far as it relates to the formation of private corporations, is substantially the same as the constitution of Oregon. It provides that—

"Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes."

In San Francisco *vs.* Spring Valley Water Works (48 Cal., 493), the Supreme Court of the State of California, in a well-considered and able opinion by Judge Crockett, held that, under this constitutional provision, the legislature could not confer upon private corporations any powers, or grant them any privileges by special act. The court say:

"Nothing short of some imperative rule of constitutional construction could justify us in holding, at this late day, that, though corporations must be 'formed' under general laws, it is nevertheless competent for the legislature, by special grant, to confer upon a corporation once organized any powers, however extraordinary. We think, on the contrary, that no corporate rights or powers can be conferred by special grant, but must all be derived under general laws."

I am aware of the decision of this court in Wallace *vs.* Loomis, (97 U. S. Reports, 146,) in which it is held that a provision in the constitution of Alabama, which declares that—

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes,"

—did not prohibit the legislature from passing a special act changing the name of an existing railway corporation, and authorizing it to purchase additional property.

But I think the power claimed for the Oregonian Company, under the Oregon act, is clearly distinguishable from the authority conferred by the act construed by the court in that case.

The power contended for by the Oregonian Company, under the Oregon act, is the power to do an act which, in the absence of statutory authority, would be against public policy and void, while the power held to have been conferred by the Alabama act was not subject to this objection.

The authority conferred upon the Alabama corporation was that of acquiring additional railroad to be operated by its responsible owner, under the powers already possessed by the corporation, and subject to the liabilities already imposed by law upon it.

Mr. Justice Bradley, delivering the opinion of the court in that case, said: "No new corporate powers or franchises were created."

Under the Oregon statute in question the power is claimed of enjoying all the privileges and franchises of a corporation by a body that has for 96 years deprived itself of all power to discharge the public duties and obligations that were the consideration upon which its privileges and franchises were granted, and that, too, although such power of dealing with corporate property is denied to corporations formed under the general laws—*a special, extraordinary corporate power.*

II. *Was the defendant in the court below authorized to enter into the contract set up in the complaint?*

Upon this point but little need be said in addition to what has already been said in discussing the power of the plaintiff in the court below to execute the contract.

1. If it is unlawful for a railroad corporation, under the laws of Oregon, to transfer its road and franchises by lease, it cannot be lawful for another railroad corporation to

hire such railroad and franchises. In other words, the business of hiring a railroad cannot be lawful unless the business of letting it is also lawful.

2. As the general incorporation law of Oregon does not confer upon a domestic railroad corporation power to let its road, it does not authorize another railroad corporation to hire such railroad.

3. As the power to execute a lease transferring its railroad and franchises cannot be acquired by a railroad corporation under the Oregon law, by stating in its articles that leasing its railroad is a part of the business it proposes to transact, the power cannot be acquired by a railroad corporation to take a lease of the railroad of another company, by stating in its articles that the hiring and operating the road of another company is a part of its business.

4. If an Oregon railroad corporation, by stating in the specification of its business in its articles of incorporation that such business shall be, in part, to hire and operate the railroad of another company, can acquire the power to do so, the statement in the articles of incorporation of the Oregon Railway and Navigation Company are void because too general and indefinite.

That the statement is "to purchase or consolidate, or lease or operate and maintain, on such terms as may be agreed upon, any railway in Oregon," &c.

It is the obvious intent of the Oregon statute (subdivision 4, sec. 4) that every railroad enterprise to be conducted under that statute shall be identified by specifying the termini of the road. This clearly has not been done in the articles of incorporation of the Oregon Railway and Navigation Company.

III. *Does the act of the President and Secretary of the Oregon Railway and Navigation Company, assuming to execute*

for that company the contract set up in the complaint, estop it from showing want of power in the lessor to execute said contract?

The Court below laid down the proposition, as I understand the opinion, that, although a contract of a corporation is unauthorized, but not in express terms prohibited by statute, or prohibited by the common law, and although unexecuted, the party with whom the contract was made is estopped to show the want of power in the corporation to make it. I do not think that such a distinction exists between contracts prohibited by statute or common law and contracts of a corporation not within the scope of its powers to perform for any purpose.

I claim to have shown that the execution of the contract set up in the complaint was *ultra vires* because it was a transaction not within the scope of the powers of either corporation to perform under any circumstances or for any purpose.

In *in re* Comstock, 3 Saw., 228, and in Semple *vs.* The Bank, 5 Saw., 88, the court refused to enforce contracts made by a foreign corporation which had failed to execute a power of attorney as required by statute, appointing an agent upon whom process could be served in suits against the corporation and held that—

"No one is estopped to show that an act upon which a party claims a right is illegal because he was a party to it —even *in pari delicto*."

There is an unbroken line of decisions in the federal and State courts of this country to the same effect.

An act is illegal when it is not according to law, and it may be of no validity and void when no law has been violated. A lack of power to make a binding contract is as fatal to the validity of a transaction as an express statutory prohibition, and there is no distinction in this respect between

an act of a corporation prohibited by an express provision of law and one impliedly prohibited, because not within the express or implied powers granted by its charter.

See Rochester Insurance Co., *vs.* Martin, 13 Miss., 59.

The contract which forms the subject-matter of this action is an executory contract.

As was said by Mr. Justice Deady—

"This action is brought on a contract to pay rent in advance and not for past use and occupation. The consideration for the covenant or promise to pay this installment of rent is not the past but the future use of the property. The contract to pay is, therefore, executory; and the same may be said of every other installment of rent provided for in the contract."

The legal disability of a corporation to execute a contract is not, in my judgment, as was held by the court below, a defense personal to the party who is under it. The doctrine of *ultra vires* rests upon considerations which affect the public. It is, as has been said, "a guard set over the prerogatives of the sovereign." A rule that the defense of *ultra vires* is a defense which cannot be taken advantage of by a party contracting with the corporation which has exceeded its powers, would remove all restraint upon the acts of corporations and enable them to make contracts not within the scope of their corporate powers with impunity. Under such a rule not only executed contracts not within the powers of the corporation must be permitted to stand, but unexecuted contacts would be enforced so long as the corporation chose to abide by its contract, and no longer.

The rule on this question of estoppel is thus stated in Morawetz on Private Corporations, §86:

"If a contract entered into by a corporation was not authorized by its charter, then such contract may be avoided by either party, so long as it remains wholly unexecuted."

"A corporation cannot be compelled by legal process to do an act unauthorized by its charter." Id., § 87.

"If contracts between corporations and individuals are absolutely void because *ultra vires*, then this defense could be set up by the individual as well as the corporation; and where it would be greatly to the interest of the individual so to do, the corporation, though suffering great pecuniary loss thereby, could not avoid such a defense on the part of the other contracting party."

Wood's Field on Corporations, § 235.

"Corporations cannot be rendered directly liable upon *ultra vires* transactions, but must account for benefits received therefrom. As long as the transaction remains executory, it is established that it cannot be enforced. But if it be executed, though in England it cannot be enforced or sued on, yet in the United States there seems some doubt whether the corporation could be allowed to set up the defense of *ultra vires*. In both countries, however unquestionably the corporation must account for benefits derived."

Green's Brice's Ultra Vires, 42.

"Any party to *ultra vires* transaction may set up the defense thereof, and any one corporator may call upon the courts to restrain the corporation from engaging therein."

Green's Brice's Ultra Vires, 42.

In Marion Savings Bank *vs.* Duncan, (54 Ala., 473,) Stone, J., speaking for the court, said:

"In the case of the Pennsylvania Railroad Company, 21 Penn. State Rep., 22, Chief Justice Black, delivering the opinion of the court, said: 'When the State means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the powers that belong to her, it is so easy to say that we will never believe it to be meant when it is not said.'

"Speaking further of the rule of construing the powers of a corporation, he said: 'In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from the doubt is against the corporation.'

"In the case of Grand Lodge of Ala. *vs.* Waddill, 36 Ala., 315, we quoted this language approvingly. Substantially the same idea was expressed in the following cases: State *vs.* Stebbins, 1 Stew., 308; State *vs.* Mayor and Aldermen of Mobile, 5 Por., 279; Mayor and Aldermen *vs.* Allaire, 14 Ala., 400; *Ex-parte* Barnette, 30 Ala., 461.

"In the case of City Council of Montgomery *vs.* M. W. Plank Road Co., 31 Ala., 76, we affirmed the above principle, and went a step further, holding that a party dealing with a corporation in a matter not within the purview of its delegated powers does not thereby estop himself from setting up in defense the want of authority in the corporation to make the contract. The same doctrine was affirmed in the case of Grand Lodge *vs.* Waddill, *supra.*

"In such a case the doctrine of estoppel cannot be let to apply without clothing corporations with the ability to increase their powers indefinitely by sheer usurpation.

"Such contracts upon the part of a corporation are *ultra vires* and void; and no right of action can spring out of them."

In Lehman *vs.* Warner, 61 Ala., 467, it was held that "A corporation cannot enforce or be made liable on a contract it was without capacity to make; and if the contract was without the scope of its corporate powers, neither party is estopped from asserting its invalidity."

In Bradley *vs.* Bradley, 55 Illinois, 417, it was said by the court:

"While a contract remains executory it is perfectly true that the powers of the corporation cannot be extended beyond their proper limits for the purpose of enforcing a contract."

In Darst *vs.* Gale, 83 Illinois, 14, where it is held that a contract fully performed will be upheld, although where the contract remains unexecuted the corporation is not estopped to say it had not the power to make it, the court say "it makes no difference in this respect whether it" (the defense of the *ultra vires*) "is interposed for or against a corporation."

In Rochester Insurance Co. *vs.* Martin, 13 Minn., 59, it was held that powers not conferred on a corporation by the statute creating it are withheld and denied as much as if the legislature had used express negative language for that purpose, (citing Bank of Augusta *vs.* Earle, 13 Pet. Rep., 588,) and that a party who had contracted with a corporation organized under the general laws of Minnesota was not estopped from setting up that the plaintiff, when sued upon the contract, had no authority under its charter to make it.

In Farmers' and Mechanics' Bank *vs.* Baldwin, 23 Minn., and in Bank *vs.* Pearson, 24 Minn., the same rule was stated, and the defense of *ultra vires* was permitted to be set up against the corporation in actions brought by them to enforce contracts which their charters did not authorize them to make.

In The Bank of Michigan *vs.* Niles, Walker, Chan., (Mich.), 99, specific performance was refused of a contract for the sale by the bank of certain real estate, made in excess of the bank's powers. The suit was brought by the bank, and the invalidity of the contract was therefore asserted by the other party.

Many other authorities might be cited to the same effect. The cases are numerous, and, with very few exceptions, will be found to be in harmony with the cases cited, and these few are cases in which the distinction was not properly drawn between the power of a corporation to perform the act in question for any purpose and the power to perform it in the particular instance then under consideration.

IV. *Is the Oregon Railway and Navigation Company, by the act of its President and Secretary in assuming to execute for it the contract set up in the complaint, estopped to deny that the hiring of said railroad was not within the scope of its corporate powers?*

The right of the plaintiff in error to set up as a defense to the action its want of power to enter into said contract is unquestionable. Upon this point the court below (Deady, J.) held that: "In an action against a corporation on a contract made by it, the corporation is not estopped to show that such contract was beyond its power to make." (Thomas *vs.* R. R. Co., 101 U. S., 71; Ogdensburgh, &c., R. R. Co. *vs.* Vermont and Canada R. R. Co., 4 Hun., N. Y. S. C., 712; Middlesex R. R. Co. *vs.* Boston & Chelsea R. R., 115 Mass., 346; Bradley *vs.* Belford, 55 Ills., 417; Bigelow on Estoppel, 3d edition, 466; Wood's Field on Corporations, sec. 386.)

See also authorities cited to show that plaintiff in error is not estopped to deny that the execution of said contract was not within the corporate powers of the defendant in error.

If it shall be claimed that the pretended lease has been ratified by the stockholders of the defendant, it is a sufficient answer to such claim to say that it appears from the answer, and as the case now stands is admitted by the demurrer, that the pretended lease was not made with the consent of the defendant's stockholders; that it was not ratified by them, and that it was not made in their interest, nor so intended; that it was in violation of their rights,; that it was a diversion of the money of defendant's stockholders to a purpose foreign from that for which it was subscribed and paid, and in which it was impossible they could have an interest; that it related to lines of road not contemplated in defendant's charter, and not possible for defendant legally to own or operate under that charter; and that plaintiff had full knowledge at the time of all these facts.

Again, if the execution of the lease was not within the corporate powers of the lessee to perform for any purpose, it could not be ratified by its stockholders.

Transactions not actually illegal or ultra vires, *but not originally binding on a corporation, may be ratified by it; but transactions which are absolutely illegal or* ultra vires *cannot be ratified.* (Green's Brice's Ultra Vires, 550, and cases cited.)

Respectfully submitted.

J. N. DOLPH,
Of Counsel for Plaintiff in Error.

APPENDIX.

AN ACT to amend section 5, of title 1, of chapter 7, of the miscellaneous laws of Oregon, as amended by section 1 of an act entitled "An act to amend sections 5, 17, and 22, of title 1, of chapter 7, of the miscellaneous laws of Oregon, as compiled by Matthew P. Deady and Lafayette Lane," approved October 21, 1878.

Be it enacted by the Legislative Assembly of the State of Oregon, That section 5, of title 1, of chapter 7, of the miscellaneous laws of Oregon, as amended by section 1 of an act entitled "An act to amend sections 5, 17, and 22 of title 1, of chapter 7, of the miscellaneous laws of Oregon, as compiled by Matthew P. Deady and Lafayette Lane," approved October 21, 1878, be, and the same is hereby, amended so as to read as follows:

SECTION 5. Upon making and filing the articles of incorporation, as herein provided, the persons subscribing the same are incorporators and authorized to carry into effect the object specified in the articles in the manner provided in this chapter, and they and their successors, associates, and assigns by the name assumed in such article shall thereafter be deemed a body corporate with power: (1) to sue and be sued; (2) to contract and be contracted with; (3) to have and use a corporate seal and the same to alter at pleasure; (4) to purchase, possess, and dispose of such real and personal property as may be necessary and convenient to carry into effect the objects of the incorporation, and to take, hold, and possess, and dispose of all real and personal property donated to such corporation by the United States, or by any State, territory, county, city, or other municipal corporation, or by any person, firm, association, or private corporation for the purpose of aiding in the objects of such corporation; (5) to appoint such subordinate officers and agents as the business of the corporation may require and prescribe their duties and compensation; (6) to make by-laws not inconsistent with any existing law for the sale of any portion of its stock for delinquent or unpaid assessments due thereon, which sale may be made without judgment or execution; provided, that no such sale shall be made without thirty days' notice of time and place of sale in some newspaper

in circulation in the neighborhood of such company for the transfer of its stock, for the management of its property, and for the general regulation of its affairs; (7) *in case the object or purpose for which any such corporation is incorporated is in whole or in part to construct, or construct and operate a railroad, to lease any part or all of its road to any other company incorporated for the purpose of maintaining and operating a railroad, and to lease or purchase, maintain and operate any part or all of any other railroad constructed by any other company upon such terms and conditions as may be agreed upon between said companies, respectively. Any two or more railroad companies whose lines are connected may perfect any arrangement for their common benefit to assist and promote the object for which they were created; provided, that nothing in this act shall be construed to authorize the leasing of any railroad line to any company or corporation owning a road which forms a competing or parallel line to its railroad.*

Received at the exective office at 8 p. m., February 10, 1887.

Filed in the office of the Secretary of State February 17, 1887, at 12:20 p. m.

(NOTE.—The above act was presented to the Governor February 10, 1887, but was not returned by him to the Legislative Assembly, and became a law without his signature, by operation of section 15 of article 5 of the constitution.)

An act to amend Section 1 of an act entitled "An Act to Authorize Foreign Incorporations to do business and Exercise their Corporate Powers within the State of Oregon," approved October 21, 1878:

Be it enacted by the Legislative Assembly of the State of Oregon, That section 1 of an act entitled "An Act to authorize foreign incorporations to do business and exercise their corporate powers within the State of Oregon, approved October 21, 1878, be, and the same is hereby, amended so as to read as follows:

SECTION 1. That any foreign corporation incorporated for the purpose of constructing, or constructing and operating, or for the purpose of or with the power of acquiring and operating any railway, macadamized road, plank road, clay road, canal or bridge, or for the purpose of con-

ducting water, gas or other substance by means of pipes laid under *the* ground shall, on compliance with the laws of this State for the regulation of foreign corporations transacting business therein, have the same rights, powers and privileges in the exercise of the rights of eminent domain, collection of tolls, and other prerogative franchises, *and in the control, management and disposition of their business franchises and property as are possessed by corporations organized for similar purposes under the general incorporation laws of this State; provided always, that in the case of the leasing of any line of railroad incorporated under the laws of this State by a foreign corporation, such leasing shall be upon the fundamental condition following and not otherwise:*

First. That such foreign corporation shall enter into an agreement in writing with the State of Oregon, duly executed by said corporation, to be signed by its president and attested by its secretary, which agreement shall be filed with the Secretary of State of the State of Oregon, whereby and wherein said foreign corporation shall agree that in all suits or actions by and between said foreign incorporation and a citizen or citizens of this State, during the continuance of such lease, shall be prosecuted or defended to a final determination in the courts constituted by the laws of this State, except in cases when such action or suit shall be commenced in or removed to the Federal Courts by a citizen of this State, and upon the failure to comply with the terms of such agreement by such foreign corporation, such lease shall ut erly determine and be rendered null and void at the option of the Legislative Assembly of the State of Oregon.

Second, That the State of Oregon reserves to itself through is (its) Legislative Assembly, and in such manner as it shall determine, the right, power and authority to prescribe the rate to be charged for the transportation of persons and property on such leased lines, and also to prescribe and make such police regulations for the government of such roads as it may from time to time determine.

Received at the executive office at 8 p. m., February 10, 1887.

Filed in the office of the Secretary of State, February 17, 1887, at 12:20 p. m.

(NOTE.—The above Act was presented to the Governor February 10, 1887, but was not returned by him to the Legislative Assembly, and became a law without his signature by operation of section 15 of article 5 of the constitution.)

United States Supreme Court.

No. ~~902~~. 275

THE OREGON RAILWAY AND NAVIGATION COMPANY,
Plaintiff in Error,

vs.

THE OREGONIAN RAILWAY COMPANY (LIMITED).

BRIEF FOR PLAINTIFF IN ERROR.

JAMES C. CARTER,
Of Counsel for Plaintiff in Error.

Evening Post Job Print, New York.

U. S. Supreme Court.

THE OREGON RAILWAY AND NAVIGATION COMPANY,
Plaintiff in Error,

vs.

THE OREGONIAN RAILWAY COMPANY, LIMITED.

Preliminary Statement.

This action was brought by the defendant in error against the plaintiff in error to recover the sum of £14,000, being an installment of rent *in advance*, alleged to be due and payable under the terms of an alleged lease of its railroad, executed by the defendant in error to the plaintiff in error, on the 1st day of August, 1881.

The pleadings were several times amended with the view of placing the facts supposed by the parties to be material upon the record, to the end that the main questions might be raised by a demurrer.

It appears by the complaint, as last amended (Record, p. 9), that the defendant in error was a foreign corporate body created under an act of the British Parliament commonly called "The Companies Act of 1862." By its "Memorandum of Association," which may be called the charter of the company, it appears that the objects of the

company were not to carry on business of any description within the United Kingdom, but to engage in railroad operations in the State of Oregon and other places in North America, and the powers purporting to be granted, or assumed, for this purpose were very extensive, embracing the construction, operation, selling, leasing, purchasing and holding and dealing in railroads, &c. (Record, pp. 13–17).

The plaintiff in error is an Oregon railroad corporation created by the filing of articles of incorporation under the laws of Oregon, June 13th, 1879. Its business was in these articles declared to be, among other things, to construct, equip and operate railroads between certain designated *termini*, and also "to purchase, or consolidate with, or lease, or operate and maintain any railroad or railroads in Oregon, Washington, Idaho or Utah" (Record, pp. 42, 43).

By supplementary articles the business of constructing and equipping railroads between other designated points was assumed (Record, pp. 45, 46).

On the 1st of August, 1881, the defendant in error executed to the plaintiff in error a lease of its railroad in Oregon for the period of ninety-six years at a yearly rental of £28,000 payable semi-annually in advance, on the 15th days of May and November in each year. The plaintiff in error thereupon entered into the possession of the road and operated the same until the 15th of May, 1884. when it denied the legal validity of the indenture of lease, disavowed the same, and offered to surrender the road to the defendant in error. The defendant in error refused to accept the same, and requested the plaintiff in error to continue to operate it temporarily, to prevent loss and public inconvenience. Such temporary occupation was continued, but without any binding agreement therefor (Record, pp. 48. 49).

The final amended answer of the plaintiff in error, filed after the hearing and decision of a motion to strike out the prior answer, denied upon information and belief the allegations of the complaint concerning the incorporation of the defendant in error, denied that it ever acquired any

rights as a corporate body in the State of Oregon, or was entitled to transact any business therein. It also, while admitting its own existence as a railroad corporation, denied that it possessed any corporate power to purchase or take by lease any railroad in Oregon, and while it admitted the execution by its president and secretary of the instrument relied upon by the defendant in error as a lease, denied the authority of those officers to thus bind their company; and then denied generally the power of either company to enter into the alleged lease (Record, pp. 72, 73).

The answer also set up by way of a separate defense, two pieces of affirmative matter. The *first* was that the railroad alleged to have been leased was not a road which the plaintiff in error was by its articles authorized to construct or operate, or having any near relation thereto or connection therewith. The *second* was that the entire capital of the plaintiff in error had been wholly invested in the construction and equipment of roads which it was authorized by its articles to construct, and that the road alleged to have been leased was an *entirely different enterprise*, so that the alleged lease involved a diversion of capital not contemplated when the capital was subscribed for, and that such diversion could not be made without the assent of stockholders, which had not been given (Record, pp. 74, 75).

The defendant in error met this answer in two forms: *First*, by a demurrer, which seems to have been specially aimed at the *denials* in the answer of those allegations of the complaint concerning the corporate existence of the lessor company (Record, p. 31). This demurrer to this extent seems to have been interposed upon the notion that the lessee company having entered into the lease could not question either the corporate existence of the *lessor* company, or the power of *that* company to make the contract. The demurrer was also aimed at the allegations of the answer of a want of *power* on the part of the lessee company to enter into the contract. And finally, the demurrer was aimed at both of the two matters of affirmative defense.

The *second* form in which the lessor company met the answer was by a motion *to strike out* (Record, p. 82). This motion was aimed at so much of the answer as denied *possession* of the road by the lessee company, &c.; also to so much as denied the power of the lessee company to enter into such a lease.

The demurrer and the motion to strike out were heard together, and both were allowed by the Court, and judgment was ordered for the plaintiff below for the amount claimed (Record, pp. 83, 84).

A writ of error was sued out upon this judgment.

Inasmuch as the ground upon which the motion to strike out was allowed was that the matter aimed at was *immaterial*, it would seem that the object might have been gained by a demurrer, and it may tend to clearness and brevity to consider that all the questions were raised by a general demurrer to the answer.

In strictness, but *one* error can be assigned or specified from an inspection of the *record*, and that is that whereas judgment was rendered for the plaintiff below, it ought to have been rendered for the defendant; but looking to the *opinion* of the Court (Record, p. 84), the following errors may be specified:

1. That the learned Court decided that the plaintiff in error having entered into a certain contract with the defendant in error under its corporate name, was estopped from questioning either the corporate existence of the defendant in error or its power to enter into the contract, and in so deciding committed manifest error (Record, p. 90).

2. That the learned Court decided that the defendant in error, the lessor company, actually possessed power to make the lease in question, and in so deciding committed manifest error (Record, p. 91).

3. That the learned Court decided that the plaintiff in error, the lessee company, had power to take the lease

in question, and in so deciding committed manifest error (Record, pp. 90–95).

4. That the learned Court decided that the circumstance that the articles of association of the plaintiff in error, the lessee company, did not embrace the right to construct or operate such a road as that mentioned in the lease was not material, and in so deciding committed manifest error.

5. That the learned Court decided that the circumstance that the whole capital of the plaintiff in error was invested prior to the alleged lease in the construction and operation of railroads described in its articles of association which were wholly different from the railroad mentioned in said lease, and had no near connection with or relation thereto, was immaterial, and in so deciding committed manifest error.

6. That the learned Court decided that the second separate defense stated in the answer, taken as a whole, constituted no defense, and in this committed manifest error.

7. That the learned Court committed manifest error in allowing and granting the motion of the defendant in error filed on the 5th of December, 1884, to strike out certain parts of the answer specified in said motion (Record, pp. 82, 83, 84).

8. That the learned Court below committed manifest error in sustaining the demurrer of the defendant in error filed on said 5th day of December, 1884 (Record, pp. 83, 84).

9. That the learned Court below rendered judgment for the defendant in error, whereas it should have rendered judgment for the plaintiff in error; and in this committed manifest error.

First Point.—The action was brought to recover for rent payable *in advance* for the half year then *current* and *unexpired.* The *legal validity* of the lease was therefore a necessary condition to the maintenance of the action.

1. Actions for the recovery of money due upon void *executed* contracts have sometimes received some judicial countenance, on the ground that the consideration for the money demanded having been received by the defendant, he should not hold on to that consideration, and at the same time refuse to pay the price stipulated for it. This position is not agreeable to sound legal principles. In such cases there may indeed be an action to recover equitable remuneration for benefits received. But the action in such cases rests, not on the *validity*, but the *invalidity* of the contract and the equitable considerations arising therefrom; and the recovery is measured, not by the stipulations of the void contract, but by a reference to *actual* value.

   Morawetz on Corporations, fol. 2 (2d Ed.), §§689, *et seq.*

2. But no such question is raised here. The covenant sought to be enforced related to the *future*, not to the past. It was wholly executory.

   Thomas *v.* Railway Company, *infra.*

Second Point.—It cannot be necessary to argue that the Oregonian Company did not acquire by the proceedings taken to create it under the "Companies' Act of 1862," the right to execute the lease. True, the language of its "Memorandum of Association" is broad enough. But it will hardly be contended

that the British Parliament can confer upon any person, natural or artificial, the right to exercise any public franchise in Oregon, still less the right to assign it to another.

1. A foreign State may create the *artificial person* which we call a corporation. This is done by a legislative act to that effect, and by defining the powers of such person.

2. Such person when thus created is, by the law of comity, recognized in foreign States, and may act in such States like any natural person. But its acts in foreign States are limited in two directions:

   (*a.*) They must be such as the law of the foreign State creating it authorized. It is only to this extent that it is a *person*.

   (*b.*) They must be such as any natural person, without incorporation, could perform. They cannot exercise *public franchises* in any State to which they may migrate, any more than other persons.
   Bank of Augusta *v.* Earle, 13 Pet., 519, 592.
   Christian Union *v.* Yount, 101 U. S., 356.
   Morawetz on Corporations (2d Ed.), Vol. 2, § 959.

3. It is, indeed, not very easy to understand how the Oregonian Company, by virtue of its British charter alone could have even *existence* sufficient for the purposes of recognition in Oregon. It will be observed that by its "Memorandum" (Record, p. 13), it does not purport to have power to construct or operate a railroad in Great Britain. Indeed, under the "Companies Act of 1862," it could acquire no such power. The act last mentioned is designed simply to provide for the incorporation of persons desiring to carry on ordinary "lawful business"

under a corporate form (Record, p. 10). A very different statute in England provides for the incorporation of railroad companies. Now, a corporation is a *person* only so far as it has been made such by law, and so far as it has no existence as a person in the State which creates it, it would seem impossible for it to receive even *recognition* in a foreign State. Can the Oregonian Company, which had no existence even as a *railroad person* (if that expression may be allowed) in Great Britain, be *recognized* as such a person in Oregon.

It is to be borne in mind that in determining what powers a foreign corporate body may exercise in a State, the first inquiry always is: What powers were bestowed upon it by the State in which it was created? This is because other States can recognize its *existence* only; and it has existence only so far as *capacity* has been conferred upon it. So far as it has *powers*, it is a *person* capable of recognition and of action, like a natural person. But beyond the scope of such powers it would seem that it is not even a person, and consequently is incapable either of recognition or action.

Are the courts of this country to recognize corporate creations of Great Britain as being capable of exercising powers here which they could not exercise in Great Britain? Or, to borrow the language of a learned Judge of the Supreme Court of Kansas, has the Parliament of Great Britain the power "to *spawn out*" a species of corporate life for no other purpose than that it may be warmed into activity under the sun of recognition in Oregon?

Land Grant Co. *v.* Coffey, 6 Kan., 254.

Third Point.—It is not an easy task to find, if the views above expressed are correct, any authority for the exercise by the Oregonian Company in Oregon of any railroad franchise whatever.

1. The State of Oregon made general provisions respecting the transaction of business by foreign corporations within its limits. These provisions were not designed to *confer franchises* upon such corporations; but to *impose restrictions* upon the doing by them of business which natural persons might do without incorporation—to prohibit them from doing any business generally permissible until they had complied with certain conditions, such as making deposit of money as security for the performance of engagements, appointing attorneys upon whom process might be served, &c.

The most important of these are contained in two sections of Chap. XX. of Oregon Gen. Laws (Deady's Gen. Laws), p. 745:

"SEC. 1. That no foreign corporation or association shall be permitted to transact the business of life, fire or marine insurance, banking, brokerage, exchange or express, within the limits of this state, without first complying with the provisions of section 2 of this Act; and every person acting or professing to act as agent for such foreign corporation or association, before such compliance, shall be guilty of a misdemeanor, and on conviction shall be punished by a fine not exceeding one thousand dollars, or imprisonment in the county jail not exceeding one year, or both, at the discretion of the court."

"SEC. 8. A foreign corporation, before transacting business in this state, must duly execute and acknowledge a power of attorney, and cause the same to be recorded in the county clerk's office,

"of each county where it has a resident agent, "which power of attorney, so long as such com- "pany shall have places of business in the state, "shall be irrevocable, except by the substitution "of another qualified person for the one mentioned "therein, as attorney for such company."

2. It not being the object of this statute to confer public franchises, railroad corporations were not mentioned in it.

3. The only act under which a foreign railroad company was permitted to exercise any franchise at all was that of October 21, 1878, which was as follows:

LAWS OF OREGON, 1878, P. 95.

AN ACT to authorize Foreign Incorporations to do Business, and Exercise their Corporate Powers within the State of Oregon.

Be it enacted by the Legislative Assembly of the State of Oregon:

SECTION 1. That any foreign incorporation incorporated for the purpose of constructing, or constructing and operating, or for the purpose of or with the power of acquiring and operating any railway, macadamized road, plank road, clay road, canal or bridge, or for the purpose of conducting water, gas or other substance, by means of pipes laid underground, shall, on compliance with the laws of this State for the regulation of foreign corporations transacting business therein, have the same rights, powers and privileges in the exercise of the rights of eminent domain, collection of tolls and other prerogative franchises as are given by the laws of this State to corporations organized within this State, for the purpose of constructing

any railway, macadamized road, plank road, clay road, canal or bridge, or for the purpose of conducting water by means of pipes laid under the surface of the ground.

SEC. 2. Nothing in this act contained shall be so construed as to give to any foreign corporation or corporations, any other or further rights, powers or privileges than may be acquired or exercised by corporations incorporated under the laws of this State; but only so as to give to foreign corporations the same rights, powers and privileges, on a compliance with the laws of this State, as may be acquired or exercised by corporations incorporated under the laws of this State.

Approved October 21, 1878.

4. If it be true, as hereinbefore suggested, that the Oregonian Company was not capable of *recognition* as a corporate body with power to operate a railroad, this act could not make it such; for this would be tantamount to creating corporations by special act, which the Legislature of Oregon is prohibited from doing, except for municipal purposes. "Corporations may be formed under general laws, "but shall not be created by special laws except for "municipal purposes" (Constitution of Oregon, art. 2, sec. 2, Deady's Gen. Laws, 1866, p. 119). A statute applicable only to foreign corporations, and which has the effect of conferring existence upon them, can hardly be deemed to be in harmony with a constitutional provision that corporations shall be *formed* only under general laws.

5. A special act was passed by the Legislature on the 23d of October, 1880 (Sess. Laws of 1880, p. 56), entitled "An Act to grant the Oregonian Railway "Company, Limited, the Right of Way and Station "Grounds over the State Lands, and Terminal Fa-

"cilities upon the Public Grounds at the City of "Portland." Reserving for consideration hereafter any effect this act may have had to enable the Oregonian Company to *lease* its road, it did in the most explicit manner assume to recognize the existence of the company with the ordinary powers of a railroad corporation. But here again it will be agreed, that if the company had not at that time any legal *existence* so as to entitle it to *recognition* as a railroad corporation, it could not have been called into existence and clothed with corporate powers by this *special* act of legislation.

Fourth Point.—If the views above suggested tending to deny the *existence* of the Oregonian Company as a railroad corporation in Oregon can be overcome, we are brought to the question which formed the main subject of contention below. Was the lease in question binding as a legal obligation between the parties thereto? Putting aside for the moment the supposed effect of any *legislation* of the State of Oregon, the question must be answered promptly in the negative. After repeated discussion this Court has determined, in the most decisive manner, that a railroad company has no corporate power, without the special assent of the Legislature, to devolve upon another by lease or otherwise for long periods of time the possession and management of its road and the exercise of its franchises.

Thomas *v.* Railroad Company, 101 U. S., 71.
Penn. Co. *v.* St. Louis & A. R. R. Co., 118 U. S., 290, 630.

1. The explicit character of these decisions and the grounds upon which they are placed—public policy—render any further citation of authorities or supporting argument unnecessary.

2. But the doctrine results directly from the nature of such public franchises. These rights, unless it is otherwise specially declared by law, can be acquired only by *direct* grant from the State. Although in their nature *assignable*, they are not assignable *in fact*, unless so declared.

New Orleans R. R. Co. *v.* Delamore, 114 U. S., 501.

Fifth Point.—Whoever asserts either that the lessor, the Oregonian Company, possessed corporate power to *make* the lease in question, or that the lessee company had power to *accept* the lease, must therefore assume the burden of showing some *legislation* of the State of Oregon conferring the power. No such legislation can be shown.

1. There is no pretense of the exisence of any legislation *expressly* conferring it.

2. It may well be doubted whether we are permitted to resort to *implication*. Changes in broad grounds of public policy should hardly be thus inferred. But the case does not call for the maintenance of such a proposition. It must, however, be conceded that, if such results may be gathered by *implication*, such implication should be a necessary one.

3. The learned judge in the Court below first avoided, or sought to avoid, the question whether the *lessor* company had the power to *make* the lease in question by deciding that the *lessee* company was *estopped* from raising the question; but he seems finally to conclude that this estoppel exists only in case the power exists! That is, that the estoppel arises only where there is no occasion for resorting

to it! (Record, p. 90.) He then proceeds with an attempt to show that the lessor company had the power to *make* the lease. It is this part only of his argument which will now be noticed. His view of the law of *estoppel* will hereafter be considered.

4. The argument of the learned judge is, in substance, that the Oregonian Company acquired by its incorporation under the British statute the right to carry on in Oregon "any lawful business;" that there is "no mystery or monopoly in the railway business in Oregon;" but that "any natural person, or corporation formed for the purpose, may, if he or it has, "or can obtain the right of way, construct and "operate a railroad between any points in this "State" (p. 90), and that "nothing appearing to "the contrary, a purpose to construct, purchase, "own, operate or *lease* a railway is as lawful as a "purpose to engage in the manufacture or sale of "any of the common necessaries of life" (p. 90).

If this be true, a sweeping revolution has indeed been made in Oregon in what have been supposed to be fundamental legal principles, and it becomes a matter of great interest to learn how such a revolution has been effected.

The learned judge very shortly disposes of the decision, apparently the very reverse of his view, of this Court in Thomas *v.* The Railway Company (101 U. S., 71), by the observation that it is "not applicable;" for the reason that the question was decided in relation to a special charter of New Jersey, whereas in Oregon any individuals are at liberty by voluntary association to construct and operate railroads at pleasure. But he fails to observe that the grounds upon which that decision was placed had no reference to the facility or the difficulty of obtaining such franchises, or whether they were obtainable by special charter alone, or accessible to all under general laws.

But it will not be pretended since the latter decision of this Court that an Indiana railroad corporation has no power to enter into a lease, that the distinction relied upon by the learned judge is a solid one. In the State of Indiana, the privilege of constructing and operating railroads is as broadly given by general laws as in Oregon.

"REVISED STATUTES OF INDIANA—1881, CHAPTER 37.

"*Corporations—Railroads—Organizations.*

"ARTICLE 1.—BEFORE CONSTRUCTION.

"SEC. 3885.—*How to form Corporations.*

"1. Any number of persons, not less than fifteen, being "subscribers to the stock of any contemplated railroad, "may be formed into a corporation for the purpose of "constructing, owning and maintaining such railroad, by "complying with the following requirements:"

Penn. Co. *v.* The St. Louis, &c., Railroad, 118 U. S., 290.

R. S. of Indiana (1881), § 3885.

5. The reasoning of the learned judge that whatever is not prohibited is "lawful business," seems open to serious objection. Trespasses and conversions by one person in respect to the property of another are not usually the subject of direct prohibition; but it would hardly be *lawful business* to engage in them.

It did not apparently occur to the learned judge that the business of establishing and maintaining public ferries, bridges, highways, &c. (and railroads are public highways), is the province of the State. It is *bound* to afford these facilities to its citizens at whatever cost, and it is consequently, and for the purpose of enabling it to perform its duty, entitled to all the revenues, tolls and profits derivable therefrom. The general policy at the present day is to

confer such franchises upon private individuals who will incorporate themselves for the purpose, and furnish the capital requisite for the exercise of them. The State is thus relieved of its burden, and the public better accommodated. But it is conceivable, and may actually happen that the State would be obliged to perform this duty in some instances. In such a case it would hardly tolerate a competition by private individuals or corporations. It would compel its citizens to patronize its own facility and preclude others from rivalry. This power could not be asserted except upon the doctrine that the construction and operation of all such public works was a *franchise*, and as such the *property* of the State alone.

The State has no *power* to prevent its citizens from carrying on ordinary "lawful business," such as the purchase and sale of goods; and according to the learned judge, it has no more power in Oregon to prevent its citizens from exercising public franchises. In his view, if it were necessary for the public convenience to bridge the Columbia River at some point, and the State should itself undertake the work, and impose tolls for its indemnification, it could not make the imposition effectual by prohibiting the constructing by private individuals or corporations of a similar work in the neighborhood.

It is doubtless in accordance with sound policy to grant and encourage the exercise by private individuals of public franchises, under suitable regulations; but the ultimate *title* to such franchises could never be safely renounced by the State.

6. The learned judge in that part of his opinion which deals with the right of the *lessee* company to take the lease, made special reference to the particular provisions of the general laws of Oregon for the formation of corporate bodies as showing that the construction and operation of railroads was in that

State ordinary, "lawful business," open to all. Inasmuch as this reference seems quite as applicable upon the question of the power of the lessor to *make* the lease, it should not be overlooked here, although the subject will be more fully dealt with at a later stage in this brief.

The statute thus referred to is chap. VIII., General Laws of Oregon (Deady's Compilation, p. 658). (Schedules A and B appended hereto contain Titles I. and II. of this chapter). The first section of this act is as follows:

"SEC. 1. Whenever three or more persons shall "desire to incorporate themselves, for the purpose "of engaging in any lawful enterprise, business, "pursuit or occupation, they may do so in the man-"ner provided in this act."

The second section provides for the making of articles of association and subscribing the same.

The fourth section declares what the articles shall specify; and the sixth subdivision of this section is as follows:

"If the corporation is formed for the purpose of "navigating any stream or other water, or making "or constructing any railroad, macadamized road, "plank road, clay road, canal or bridge, (they shall "specify) the *termini* of such navigation, road, "canal, or the site of such bridge."

Section 5 declares:

"SEC. 5. Upon the making and filing of the "articles of incorporation, as herein provided, the "persons subscribing the same are corporators, and "authorized to carry into effect *the object specified* "*in the articles*," &c., &c.

It might be argued from this that as the statute begins by allowing corporations to be formed for "any lawful business, and subsequently *assumes* that articles drawn in pursuance of this permission

may specify the construction and operation of railroads, it views such business simply as "lawful business," like the manufacture of goods. But this would be merely verbal and very unsubstantial reasoning. The act simply provides in *one* statute for the formation, under general laws, of corporations for all purposes. If, as is usually the case, different statutes were devoted to the several different kinds of corporations the ground of the argument would be taken away.

To gather, by *implication*, from the manner in which this statute is framed, an inference of an intent on the part of the State to renounce all its sovereign franchises, and to regard them in no other light than the common rights of individuals to carry on ordinary private transactions, would be in defiance of the fundamental rule which requires us to apply a strict construction to all public grants, and would impute to the Legislature an intent which it is well nigh incredible that it should have. Surely before such an abdication of sovereign rights and functions can be imputed to a Legislature, its intent to that effect must be manifested in the most unambiguous terms.

Charles River Bridge *v.* Warren Bridge, 11 Pet., 421.

7. The learned Judge refers to the Act of Oct. 21, 1878, hereinbefore printed (Sess. Laws, 90).

Passing the question already considered whether a foreign railroad corporation not clothed with *capacity* as a *railroad person* under the government creating it, can, constitutionally, even be *recognized* in Oregon, we may admit that this act does enable foreign railroad corporations which actually have *capacity* as such in the States creating them to exercise the franchise of *constructing* and *operating* railroads, but it goes no further. It does not authorize them to *lease their roads.*

The first section of this act is the only one purporting to *grant* any powers to a foreign railroad company, and this grants to them the same rights of eminent domain and other *prerogative* franchises as "are given by the laws of this State to domestic "corporations, organized within this State for the "purpose of constructing any railway," &c., &c. It is exceedingly plain that under the provisions of this act no right to assign a franchise is given, even if domestic corporations possessed such a right. It is the power to *do* railroad business which is thus given, not the power to *cease* to do it, and to transact the other business of receiving and distributing among stockholders the rental received for property. To sustain this construction there is no need of a resort to the rule, which is, however, very pertinent, that in the construction of statutes making public grants, nothing is to be taken by implication. The *second* section *purports* to grant *nothing;* but is intended, *ex abundanti cautela*, to make it certain that the first section shall not be construed as conferring upon foreign railroad corporations greater rights than domestic ones possess.

A reasonable interpretation of this act can hardly go further than to gather from it a power to foreign corporations to exercise the right of eminent domain, and such other public franchises *as may be necessary to enable it to construct and operate* its road.

All that the learned Judge himself claims for this act is that it places foreign corporations upon the same footing as domestic ones, and would therefore allow the former to lease their roads, if that privilege were allowed to the latter. But this, as already shown, is not the just interpretation of the act; if it were, it would avail nothing. It would still be necessary to show that domestic corporations had the power to make such leases.

8. But the learned Judge points to a special act which, in his opinion, clearly recognizes "the right of the

"Oregonian Company" to "construct, own and "operate this road, and to dispose of it either abso- "lutely, or for a term of years." This is the Act of October 22, 1880, already referred to (Session Laws of 1880, p. 56. See preamble and first part of this act in Schedule C). I have already considered whether this act may be regarded as having effectually recognized the *corporate existence* of the Oregonian Company in Oregon; but the question now is whether it clothes that company with any power to make the lease in question.

As to any direct or express authority to the company to dispose of its road or franchises in any manner, by lease or otherwise, there is none in this act, and, with deference to the learned Judge, the undersigned, so far from seeing any *necessary implication* to that effect, can see no ground for any implication whatever.

If there be any such implication, it arises from the circumstance that in the *granting clause* of the act the word "*assigns*" is used, and that there is a restriction imposed upon the principal grant to the effect that "the said Oregonian Railway Company, "Limited, or its *assigns*, shall have no power to "sell, convey or assign the premises or rights here- "by granted, or any part or parcel thereof, to any "person, persons, firm or corporation, *save only* "*with, and as part and parcel of, and as appurte-* "*nant to the railway*, now built and owned by said "company, and now in process of construction by "it."

It is at all times extremely unsafe to impute to a legislature an intent not directly and expressly manifested. Laws are passed hurriedly, without special attention to the language employed in them, and often with a total neglect of such language by many members who, conceiving that they understand the main object of the proposed legislation, are content to let it pass without scrutiny. Here was a private bill proposing to make a grant to a private cor-

poration and having no other object, and yet the argument of the learned Judge must be that the members of the Legislature must have scrutinized its language, considered its possible effect upon the general law and policy of the State, and concluded that it was wise to waive either generally, or in favor of this particular corporation, a settled rule of State policy, or they would not have allowed the bill to pass in the form in which it was passed. This seems to be an assumption not at all justified by what we know of the usual course of legislation, and especially of private legislation. How can we feel assured that the members of the Legislature did anything more than is usual in such cases, namely, ascertain by hasty perusal the general object of the bill? How do we know that some members did not object to the particular phraseology which the learned Judge referred to as tending to lead to a belief that a change in State policy would be effected by it, and were satisfied or silenced by the confident assurance of others that it would require express language to work any such change, and that the object of the language in question was to secure in all contingencies the occupation of the premises granted as a terminal of the railroad?

This general reasoning would be quite sufficient to lead to a rejection of the inference of the learned judge; but we are not left to such argument. Special reasons may easily be perceived for adopting the phraseology employed, very widely removed from any design to recognize or confer any authority to lease or otherwise dispose of the railroad of this company.

The principal subject of grant was *land* in the City of Portland for terminal facilities. This was tangible property, and would be necessarily *assignable* if a *fee* was conveyed. It was the intent of the Legislature to convey *a fee*, and therefore it was perfectly natural and proper, if not necessary,

that the word *assigns* should be used in the granting clause. Such a conveyance, if made by private persons to the company, would, as a matter of course, have contained this term. But the company, if it held the fee without restriction, could have sold and conveyed it to any purchaser. Its inability to sell or lease its railroad and franchises did not involve any inability to dispose of any of its property not necessary to the fulfillment of its obligations to the public to exercise its franchises. Such a disposition, however, would not be in accordance with the legislative intent. That intent simply was that the property should be forever used for the purposes of the railroad, and that no person or corporation should ever hold it except as part and parcel of the railroad. A restriction was therefore necessary, and the one adopted seems very well suited to the purpose. It was wise to provide in it for possible contingencies in the future. The power to mortgage or otherwise assign the railroad might thereafter be given by the State, and should this happen, the land granted and the railroad might become vested in different owners, and the legislative intent be thus defeated. It might indeed have been that the Legislature, or some of its members, entertained the same views with the learned Judge, that under the Oregon system railroad business was mere "lawful business," like buying and selling goods; but an error entertained by a legislature as to what the law is, does not change the law so as to make it conform to the error. They might have entertained the view that the law was as indicated, and at the same time have regretted that such was the fact. Or, the Legislature might have been in doubt as to what the law was, and deemed it the part of prudence to make a provision which would answer the purpose in hand upon any view of the law.

These observations may serve to show the danger,

frequently pointed out by Courts, of imputing an effect to laws which were passed *alio intuitu*. Where, indeed, as is sometimes the case, a legislative act cannot *have the effect* it was plainly and expressly designed to have, unless it at the same time has *another* effect not expressly declared; we may safely infer that the latter effect was intended also. Implications should not in general be resorted to unless they are *necessary to the operation of the act* out of which the implication is drawn.

9. But reasoning on this point is unnecessary, if not out of place. Much more substantial grounds for raising an implied legislative authority to a railroad company to make a lease of its road, were declared by this Court wholly insufficient in the case of Thomas *v.* Railroad Company (101 U. S., 71, 84). In that case, an attempt was made to sustain the validity of a lease of the railroad by a reference to a special act of the Legislature passed while the road was in the hands of the lessees. This act made it unlawful "for the directors, agents or *lessees* of the said railroad" to charge more than certain specified rates for the carriage of passengers and merchandise, and it further provided that nothing contained in the act should deprive the railroad company "*or its lessees*" of the benefits of the provisions of another act referred to. That this was a legislative recognition of the *fact* of the lease could not be doubted, and it could plausibly be argued that it was a recognition of *rights* acquired by the lease. But this Court held that the act was not passed with any *view* either of sanctioning or disapproving the lease, but *alio intuitu*, and could not be appealed to as evidence of any *assent* by the State to the validity of the transaction.

So also in the other case hereinbefore referred to (Penn. Co. *v.* St. Louis, Alton, &c. Railroad, 101 U.

S., 290), it being necessary to show that Indiana railroads had authority to enter into an indenture of lease, an act of the Legislature of that State was relied upon as waiving the policy of restriction, and thus conferring the power. The act declared that "In case any railroad or part thereof shall have "been, or shall hereafter be *leased*, conveyed or "mortgaged, and shall be in the possession of 'the "lessee company it should be taxed as the property "of the latter company.'" But it was in like manner held that no authority to make leases of railroads could be thus gathered.

See also East Alabama Railway Co. *v.* Doe, &c., 114 U. S., 340.

10. It may possibly be argued that this act of the Legislature, taken in connection with the fact that the Oregonian Company *assumed*, by its memorandum of association, to have the power of leasing or otherwise disposing of any railroad it might own (Record, p. 13), is a recognition of *this sort* of a corporate person, and especially a recognition and sanction of it as possessing the power thus assumed. But this view would furnish no reasonable ground for the requisite implication.

(*a.*) The mere recognition by one State of a corporate body created by another does not have the effect of enabling it to exercise all the powers which it purports to possess, but only those of such powers as natural persons would possess without incorporation. And in this respect it would seem that mere recognition by the Legislature would have no larger effect than the ordinary recognition which judicial comity makes. There are probably statutes in nearly all our States which provide facilities for the transaction of business within their limits by foreign corporations; but these statutes are never regarded as

bestowing upon such corporations any franchises or powers which the State does not give to its own citizens, corporate or natural.

(*b.*) True, the statute makes a grant of lands and other rights to the corporation; but this while, aside from the constitutional difficulty already suggested, it allows the corporation to hold the things granted, does not, even when we regard the form of the grant, necessarily or justly imply, that it may assign by lease, or otherwise, not only the things granted, but things *not* granted, namely, its railroad and franchises. As has already been shown, it would not have had such an effect if the grant had been made to a domestic railroad corporation.

(*c.*) But the more substantial answer is, that the proposition sought to be maintained, and necessary to be maintained, is that the Legislature of Oregon has *authorized* this company to make a lease of its road; that is that it has *intentionally* authorized a thing which the general policy of the State forbids. The question is as to an *actual, conscious* intent of the Legislature. This can be made to appear only by showing that the *attention* of the Legislature was called to the powers assumed by this company in its "Memorandum of Association," and that with such powers in view it intended to confer or recognize a right to exercise them in Oregon. There is no evidence of this; and to *assume* it would be to found one implication upon another. Nay, more; the act itself contains the unusual feature of a *recital* of the motives and purposes of the Legislature in enacting it, and in such recital no mention whatever is made of the assumed powers of the company or of any intent to bestow upon it the power of leasing its road,

We have incidentally observed, and shall, in our next proposition, more fully show that domestic railroad corporations in Oregon have no such power of leasing their roads. This renders it still more improbable that the Legislature intended to bestow upon a foreign corporation a privilege denied to domestic ones.

Sixth Point.—If the foregoing views are well founded, there is no special legislation of the State of Oregon which enables this Oregonian Company to *make* a valid lease of its road, and it is, at least, not free from doubt whether that body can exercise *any* railroad franchises in that State. But the learned Judge intimates, without directly asserting, that all domestic railroad corporations may lease their roads, and that the Oregonian Company has the same rights in all respects which are conferred upon domestic companies. We have, in the course of this argument, offered some suggestions designed to show the error of such a view. We purpose now to more fully expose this error:

1. The only ground upon which foreign railroad companies can be placed in respect to power of making leases upon the same footing with domestic companies is to be found in the Act hereinbefore referred to of October 21, 1878.

   It will be observed that the grant of privileges contained in this act is limited to foreign corporations formed "for the purpose of *constructing, or* "*constructing and operating, or for the purpose of,* "*or with the power of acquiriny* and operating "any railway," &c. This very full enumeration does not include the purpose of *leasing;* and it would seem to be a reasonable interpretation of the

act to say that its design was to aid foreign corporations in carrying on railroad business, and not in leasing railroads to be carried on by others.

2. But indulging, for the purpose of the argument, the view that foreign corporations have the power of making leases, if domestic ones possess it, it remains for those who support the judgment appealed from to show that the latter have such power. Plainly they do not.

(*a.*) The mere fact that railroad corporations are formed by general laws instead of by special charter is wholly immaterial. This mode adopted by the leaned Judge of avoiding the effect of the decision in Thomas *v.* Railway Company is no longer available after the decision in Penn Co. *v.* St. Louis, &c., R. R. Co., 118 U. S., 290, 630.

With deference to him, this circumstance has no importance. Railroad corporations are formed in Oregon under general laws, because the constitution of that State, like those of many other States, requires all corporations, except municipal ones, to be so formed. This policy had no special reference to railroad companies, and was adopted from motives quite apart from any consideration of the particular powers which any corporations might exercise. To impute to the simple determination that *all* corporations should be formed under general laws, an intent to deal with the subject of public franchises in particular, to change a settled policy of all States, and to abdicate the exclusive ownership by the State of all public franchises of every description, seems to be stretching implication beyond all reason, and this, too, where implication should be but sparingly indulged.

(*b.*) Particular provisions of the general statutes of Oregon referring to corporate bodies in general,

and to railroad corporations in particular, were referred to by the learned Judge in support of his decision that the *lessee* company had the right to *accept* the lease. If these had any pertinency at all, they would seem to be equally serviceable in support of the contention that the *lessor* company had power to *make* the lease. Some observations will be offered under the next point upon this part of the opinion of the Court below. But the undersigned here refers to the full and complete explanation of these provisions contained in the briefs of Mr. Bartlett and Mr. Dolph, which will be submitted with this.

Seventh Point.—The learned Judge seemed to view it as unnecessary to take much pains to show that the *lessor* company had power to *make* the lease for the reason that the *lessee* company was, as he conceived, precluded by an *estoppel* from drawing *that* in question. This resort, however, he perceived was not available upon the question whether the lessee company had power to *accept* the lease, and he felt himself obliged to establish the actual existence of such power. His argument seems to be in substance that inasmuch as corporations can be formed in Oregon to carry on any "*lawful business*," provided they state the business in the articles of incorporation, and as by the statute they are permitted to state therein the business of constructing and operating railroads, that business is thus placed upon the footing of ordinary "lawful business;" that any number of corporations can be thus formed for the same purpose in the same place, so that it is of no consequence which carries it on; that the purpose and effect of this system are to put all corporations, railroad as well as others, upon the same footing as ordinary partnerships, and that

there is no more reason than in the case of a partnership why a railroad company should not be permitted to assign by lease or otherwise its property, provided it includes in its corporate articles the power of making such assignment, and that the lessee company having done this possesses the power.

This reasoning will not bear a very close scrutiny.

1. It may be well to take into view some important consequences which would flow from this doctrine.

(*a.*) The powers to construct and operate railroads, as well, indeed, as turnpikes, bridges, canals and ferries, would cease immediately to be *franchises*, and the only existing franchise in the State would be the franchise *to be a corporation!* Where would the *power* be found to require the privilege to be exercised for the public benefit? A corporation carrying on the business of manufacturing and selling goods could hardly be required by law to manufacture or sell any more than suited its pleasure. This is because the manufacture and sale of goods is ordinary business. If carrying passengers and goods is no more, how could the State require more? It does not hesitate now to prescribe fares, the kind of vehicles, the kind of tracks, provisions for depot, &c., &c., and to enforce its requirements by writ of *mandamus* even. Everything necessary to supply every public need the law does not hesitate to exact, not only by statutory regulations, but by special judicial command. Surely, this could not be done if the privileges thus bestowed were not franchises, but mere ordinary business. It may be said that there would still be the distinction between public and private *employments*, and that railroad companies would be subjected to the obligations of common carries upon public highways. But the powers which the State may

exercise over persons who simply engage in the business of common carriers are greatly limited. They are feeble, indeed, as compared with those assumed over railroad corporations. The latter are viewed, not as common carriers *on* public highways, but as operating, controlling and managing the *whole highway*.

(*b.*) Again, a public franchise is held upon *condition* that it be *used*, and not *abused*. And for a breach of the condition in either particular a forfeiture may be declared. This doctrine is founded upon the necessity of enabling the State to enforce the performance for the benefit of the public of the obligations inseparably connected with franchises. A franchise is a part of the royal prerogative subsisting in an individual, natural or artificial. (2 Bl. Com., 37.) It is placed there by a public grant in order that it may be made available for public purposes. If this object of the grant is disappointed, the State may recall the franchise to itself again. This is one of the efficient means employed by the State to carry out public objects. But if operating railroads be mere "ordinary business," surely the State cannot deprive any persons of the right to carry it on. And yet, it will be perceived that the State of Oregon, notwithstanding this alleged extinction of all public franchises by a conversion of them into "ordinary business," carefully retains and regulates the judicial power of forfeiture for *nonuser* or *misuser*.

(Deady's Gen. Laws, 1864, chap. 4, Tit. V.)

True, this remedy may not be so effective where the same individuals, from whom a franchise is thus taken, may at once reincorporate themselves, and perhaps succeed in regaining an effective right to operate the same road. But the State

has, and preserves the power to render this provision effective by granting the recalled franchise to designated individuals and making the grant exclusive. The power of the same persons to regain such a franchise after forfeiture is involved in uncertainty, trouble, peril and expense, and the power of forfeiture consequently remains an effective *in terrorem* safeguard against the neglect or misuse of franchises.

2. These consequences lead to the conclusion that before we can admit that the State of Oregon has renounced in favor of corporate bodies all its franchises, some express and unequivocal declaration of its people or Legislature to that effect must be pointed out to us. Where is this declaration to be found?

The learned Judge leaves us in doubt as to where he thinks it is to be found. In some parts of his opinion he expresses himself most emphatically to the effect that any such declaration is unnecessary; that the right to operate railroads and to lease them is, *in its nature*, mere "lawful business," and consequently open to all because it is *not prohibited!* And in his view the only thing which a man or a corporation in Oregon needs from the State for this purpose is, where he cannot buy or lease a railroad, the right to take private property! We feel under the necessity of justifying the imputation to him of this view by quoting his language. He says (p. 90): "Nothing appearing to the contrary, a purpose to "construct, purchase, own, operate, or lease a rail-"way is as lawful as a purpose to engage in the "manufacture or sale of any of the common neces-"saries of life. And it (The Oregonian Company), "was and is at liberty under the *comity of nations*, "and *until the Legislature shall prohibit it*, to pur-"sue such purpose, or exercise such powers, in "Oregon! * * * * *Any natural person* or cor-

"poration formed for that purpose, may, if he, or "it, has or can obtain the right of way, construct "and operate a railway between any points in this "State, and dispose of the same as freely and "absolutely as if it were a steamboat or a mill!" And he further says (Record, p. 94):

"There was never any legislative or judicial ac- "tion in this State, except in one particular to be "hereafter noticed, indicating that such a trans- "action is unlawful or contrary to public policy. "To take a lease of a railway and operate it is in "itself as lawful and meritorous an act as to con- "struct one. *No one would question the right of a "natural person to do such an act.* And whatever "anyone may do as an individual any three or "more persons may do as a corporation!" &c.

No constitutional or statutory provision is pointed out by the learned judge as creating this condition of the law. In his view it is a fundamental principle which in some unexplained manner has found its way into Oregon without the aid of positive legislation.

It can hardly be needful to enter upon a labored refutation of such a notion. It seems to be based upon an entire misconception of the nature of public franchises. Certainly the operating of a railroad may be a "meritorious" act. So may the ploughing by one man of another man's field be "meritorious" and lawful. But it is not so unless permission to do it is first acquired from the owner. The right to maintain and operate railroads is primarily the property of the State, and no private person, natural or artificial, can carry it on without the permission of the State. This right in the State is not created by affirmative prohibition. It exists as an original title.

3. The argument above noticed of the learned judge is really the only one upon which he relies to prove

that domestic railroad corporations in Oregon have power, if they choose to assume it, by their articles of incorporation, to make and accept leases of railroads. He does not, as we understand him, contend that the general statutes relative to the formation of corporations, railroad among others, create and confer, *proprio vigore*, any such power. His view is that such power may be freely exercised by natural persons, and may, consequently, be as freely exercised by corporate persons, provided they comply with the provisions of the statutes and assume the power in their constituting articles. He insists indeed that there is nothing in those statutes *inconsistent* with the exercise of this power by corporate bodies. It may be urged, however, by others that these statutes do, under a general permission to form corporations for any "lawful business," contemplate that articles constituting a corporation may state the business of constructing and operating railroads, and thus necessarily *make* that business "lawful business" if it were not so independently of the statute. We have already, under another head of this brief, offered some observations on this point. There is room for other suggestions. The argument is much more specious than sound.

a. Its principal fallacy lies in confounding *corporate capacity*, which *fits* or *qualifies* a corporation to act in a certain way, with the substantial *title* or *right* to act in that way. The distinction between these two things, though extremely broad, is frequently overlooked—totally overlooked by the learned judge. Some labor is justifiable in making it clear.

(1.) The essential, and the only essential, thing done by the State in the formation of a corporation is the creation of an *artificial person* and the definition of the *faculties* or *capacities*

of such person. If, in defining the capacities of the artificial person thus created, they are stated to be those of manufacturing goods, a *manufacturing* person is created; if they are stated to be the construction and operation of a railroad, a *railroad* person is created, &c., &c.

(2.) Whether a corporation in any case can, upon coming into existence, without more, actually *do* the things which it has a capacity to do, depends upon whether those things can be done by any person who has the *capacity* to do them, and nothing more. Any natural person may carry on a manufacturing business because he has the *capacity* to do it, and the *right* to do it is *open to all.* Any natural person has *capacity* to construct and operate a *railroad*, but he has not, without more, the right to do it, because that business is not open to all. It is the exclusive prerogative of the State; in other words, it is a *franchise*, and before he can do it, he must obtain from the State a grant of the right. In like manner a railroad corporation has upon mere creation, *capacity* to construct and operate a railroad, but no *right* to do it until it obtains a grant from the State.

(3.) The State may, and often does, under general laws, grant to corporate bodies, immediately upon their coming into existance, substantial franchises to operate railroads, highways, ferries, &c.; but these substantial franchises are, nevertheless, other and very different things from the corporate *capacity* which enables them to receive and hold the franchises.

(4.) The corporate *capacity*, in other words, the right *to be a corporation*, is itself called a fran-

chise, and properly, for it can be conferred by the State alone; but it is a different thing from the right to *do* anything, to take any actual part in the business of the world. Even the right of a manufacturing company to manufacture goods is a different thing from the *capacity* to exercise this right. It comes into the possession of the corporation as soon as the latter comes into existence; but this is because it is the common right of all persons.

The right to *be a corporation* may be called its *qualifying* franchise. The rights to do anything may be called its *substantial rights* or *franchises*, according as they may or may not, be open to all. The former is not bestowed upon the corporation, but, antecedently to the existence of the corporation, upon the *corporators*. The latter are bestowed upon the corporation itself, after it is formed. The former makes up and constitutes the *person possessing;* the latter are the *things possessed.* Even in the case of a corporation created by special charter, its substantial rights, in logical and legal contemplation, succeed, in the order of reception, the qualifying franchise (Story, *J.*, in Dartmouth College *v.* Woodward, 4 Wheat., 519, 680, 691).

(5.) The substantial rights of a corporate body are such as *may* be held by any natural person without incorporation, the qualifying franchise can be held by the individual corporators alone. The substantial rights, are assignable, *in their nature*, if they are such as constitute a franchise. and in the case of other substantial rights which are open to all, they would be assignable *in their nature*, if a thing could properly be so called, the assignment of which would give the assignee no more than he already possessed,

and would leave the assignor with just as much as he had before.

But whether the substantial franchise is *in fact* assignable, depends upon whether the law has made it so.

Hall *v.* Sullivan Railway, 21 Law Reporter, 138.

New Orleans R. R. Co. *v.* Delamore, 114 U. S., 501.

b. The object of Title I. of the general statute of Oregon for the formation of private corporations is simply to create corporate *persons* and define their powers. It makes no grant of any *substantial franchise* whatever. If a company thus formed need no franchise, in other words, if it is incorporated for the purpose only of carrying on some business which natural persons can carry on without incorporation, as, for instance, the manufacture and sale of goods, it can, of course, proceed with such business without a further grant of power. It is, so to speak, a *manfacturing person*, and can do in that direction what any person with that *capacity* can do. But if the corporation be formed for the purpose of operating a railroad or other highway, or exercising any other public franchise, it must acquire, in some manner, besides the *capacity*, the right or title to operate it. It must not only be, so to speak, a *railroad person*, put it must have a railroad franchise. A corporation might be formed under this title for transacting the business of selling the lands of other persons for a commission, and this would be "lawful business;" but before it could proceed to sell any person's land it would probably be obliged to obtain the permission of the owner.

c. The substantial franchises for operating railways,

roads, canals and bridges, are given by independent legislation contained in Title II. of the same chapter.

Secs. 31, 32, 35, 36.

d. We thus perceive that "any lawful enterprise, business, pursuit or occupation," mentioned in the first section of Title I. means what the learned Judge supposes it to mean, any which is *not prohibited by law;* and undoubtedly permits corporations to be formed for all purposes. But the clause in section 5, which declares that upon filing the articles of incorporation the persons subscribing the same are incorporators, and authorized "*to carry into effect the objects specified in the articles*" simply gives *capacity* for that purpose, but not necessarily the *right. That*, if open to all, may be enjoyed without more; but if it be a *franchise* it must be acquired by special grant from the State, or by taking the steps prescribed by the general law.

e. That this is the true interpretation of the statute becomes manifest at once by taking the case of a *ferry.* A ferry is a franchise; but no direct provision is found in Title II. for acquiring it; nor any which grants it by implication even. Nevertheless, there can be no doubt that a corporation for keeping a ferry could be formed under the provisions of Title I. This clearly appears by a proviso in section 20 of that title, which mentions "corporations heretofore incorporated, or which "may hereafter be formed *under this act* for the "purpose of establishing and *keeping a ferry* "across any stream or other water," &c. But any corporation thus formed would not, without more, have any right to keep a ferry. Distinct provision for acquiring this franchise is made by another law which empowers county

courts to grant licenses therefor (chap. 47, Tit. II., Deady's Laws of 1864, p. 808, *et seq.*). See Schedule D.

4. Nothing more can be needed to show that it is not true in Oregon, any more than anywhere else, that railroad franchises have ceased to be franchises. They must still be *acquired* from the State, and the mere obtaining of *capacity* for that purpose does not complete the acquisition. They can be completely gained only by special grant from the State, or by taking the requisite steps under general laws. And when acquired they are subject to the same incidents which franchises have always been subject to; one of which is, that they *cannot be assigned by lease or otherwise* without the authority of law for that special purpose, and no such authority can be found in the law of Oregon.

5. The circumstance, therefore, that the lessee company inserted in its articles of incorporation, the assumption of authority to accept leases, gave it no such authority. Still less did a like assumption of authority in the memorandum of association of the lessor company to *make* leases give that company any such authority. What is needed for such purpose is the *act of the State*, not the mere assertion of a corporate body. The function of articles of incorporation is to confer upon individual corporators *qualifying corporate capacity*, not *substantial rights*.

Eighth Point.—It may be argued that it would be enough to validate this lease to interpret it as demising the road alone *without the franchise*, and that the lessee company could then operate it under its own original franchise. This view is wholly inadmissible.

1. It assumes that the lessor company has the right to disclaim its public obligations. It has no such right. Any attempt thus to rid itself of its franchise is *illegal*. Here, again, we may add that this imputes to the State of Oregon (for foreign railroad companies certainly cannot do what domestic ones cannot) an intent to permit railroad corporations, to which it gives *capacity* only upon condition that it states its purpose to construct and operate a railroad in its Articles of Association, the power at any time to cease to be *such* a corporation, and yet remain a corporation for another purpose, namely, the receipt and distribution among its stockholders of rent, which is not specified in its articles at all.

2. But, more decisively, the Oregon Railway and Navigation Company never acquired by its articles *capacity* to operate this particular road. The statute requires that the corporators, in order to acquire such capacity, should *designate the termini* of the road they propose to operate in their articles (Sec. 4, clause 6). And by Section 36 of Title II. the franchise to take tolls is given only in respect to the road the *termini* of which are thus designated.

3. It is the rightful province of the State, and a very common practice, to impose upon such bodies as railroad corporations the duty of keeping certain accounts or statistics and making reports verified by certain specified officers of the corporations. Such duties can be properly performed only by the officers of the corporations who have actual control of the operations of the road, and they could not be enforced against *lessees* except by special provisions of law applicable to them. Such duties are, in fact, imposed in Oregon upon turnpike and bridge companies (Title II., § 37). These duties are in terms imposed only upon the corporations *organized* for the construction and operation of the roads and

bridges which they in fact operate, and could not be enforced against *lessees*. And yet they could not be properly performed by a company not having the actual control of the business. There is, therefore, here a distinct implication that the law in Oregon does not recognize the leasing of turnpike roads and bridges. But if these may not be leased there is no reason to suppose that railroads can be, for both classes of franchises are placed upon the same footing by the statute.

It is distinctly alleged in the answer and admitted to be true by the demurrer, or motion to strike out, that the road in question was not thus specified and designated in the Articles of Association of the lessee company (Record, p. 74).

Ninth Point.—The lessee company was not *estopped* from drawing in question the power of the lessor company to *make* the lease.

1. The want of mutuality would be a sufficient objection to this alleged *estoppel*. The view of the learned Judge necessarily concedes that if the action were brought by the lessee company against the lessor company for a breach of some covenant of the lease, the latter would not be *estopped* from denying its *own* power. We should, therefore, have a lease impregnable against attacks by the *lessee*, but avoidable at any time at the pleasure of the lessor! The latter could, therefore, insist upon it so long as it might be made profitable, and avoid it whenever its interest might be better served by such action, while the former would be tied to it through every vicissitude. The law allows no such anomalous inequality between the parties to a contract,

unless the one subjected to it has committed some fault which justly entails such a disadvantage. Estoppels should be mutual.

Dutchess of Kingston's Case, 2 Smith's Leading Cases (6th Am. Ed.), notes, pp. 710, 711.

2. But how can one be estopped from saying that a contract is invalid when it is against the policy of the law? How could the law enforce its *policy* in relation to unlawful contracts if parties were not permitted to set up the illegality? The law is so entirely otherwise that it permits a *particeps criminis* to assert his own guilt in entering into an unlawful contract, although this is in contravention of the maxim *nemo allegans suam turpitudinem est audiendus.*

Collins *v.* Blantern; 1 Smith's Leading Cases (6th Am. Ed.), 609, and notes.

3. But this notion of *estoppel* proceeds from the same error already fully treated—the confounding of corporate *capacity* with the substantial titles or rights of a corporate body. There is some reason as well as some authority for the doctrine that where a party enters into a contract with a corporate body by name he is estopped from denying the *existence* of the corporation; and this means that he is estopped from denying the corporate *capacity* to make the contract, for corporate *existence*, and corporate *capacity* are the same things. A corporation can have *existence* only in the *capacities* with which it is clothed. But where the corporate body in order to make the contract must have corporate *capacity*, and something besides, namely, the special authority of the State to do the act it attempts to do, the other contracting party cannot be precluded from saying that it did not have the authority it assumed to have. Such a doctrine would be simply a reward bestowed upon a party for a false assumption of power!

It would be a singular attitude for the State to assume, to say that, although it would not permit the holders of franchises to assign them, it would yet take good care, in case an assignment were attempted, to preclude the objection from being raised! It has always been supposed that the purpose of *estoppels* was to promote, not to defeat, the policy of the law.

Tenth Point.—The second and distinct defense set up in the answer (Record, p. 74) presents a different question. That question relates not to *corporate* power, but to the power of directors, and is this: When a corporation which has *power* to engage and invest its capital in two or more different and separate enterprises has once made a selection and invested its entire capital in one only, can its directors *without the authority or assent of the stockholders*, and without any new contribution, *divert the capital* and engage in another distinct enterprise, even though they might originally have done it? It is submitted that this question must be answered in the negative.

Bagshaw *v.* Eastern Union Railway, 2 Mac. & N., 389.

Lastly.—The judgment of the Circuit Court should be reversed, and as there is no controversy between the parties not presented by the record, judgment should be ordered on the demurrer for the defendant below, with costs.

JAMES C. CARTER,
Of Counsel for Plaintiff in Error.

SCHEDULE A.

Laws of Oregon (Deady's Comp.) 1866.

CHAPTER VIII.

TITLE I.

General Provisions in Relation to the Formation of Private Corporations.

SECTION 1. Whenever three or more persons shall desire to incorporate themselves, for the purpose of engaging in any lawful enterprise, business, pursuit or occupation, they may do so in the manner provided in this act.

SEC. 2. Such persons shall make and subscribe written articles of incorporation in triplicate, and acknowledge the same before any officer authorized to take the acknowledgment of a deed, and file one of such articles in the office of the Secretary of State, another with the clerk of the county where the enterprise, business pursuit or occupation, is proposed to be carried on, or the principal office or place of business is proposed to be located, and retain the third in the possession of the corporation.

SEC. 3. The articles of incorporation, or a certified copy of the one filed with the Secretary of State or the County Clerk, is evidence of the existence of such corporation.

SEC. 4. The articles of incorporation shall specify:

1. The name assumed by the corporation, and by which it shall be known, and the duration of the corporation, if limited;

2. The enterprise, business, pursuit or occupation in which the corporation proposes to engage;

3. The place where the corporation proposes to have its principal office or place of business;

4. The amount of the capital stock of the corporation;

5. The amount of each share of such capital stock;

6. If the corporation is formed for the purpose of navigating any stream or other water, or making or construct-

ing any railroad, macadamized road, plank road, clay road, canal or bridge, the termini of such navigation, road, canal or the site of such bridge.

SEC. 5. Upon the making and filing of the articles of incorporation as herein provided, the persons subscribing the same are corporators, and authorized to carry into effect the objects specified in the articles, in the manner provided in this act; and they and their successors, associates and assigns, by the name assumed in such articles, shall thereafter be deemed a body corporate with power:

1. To sue and be sued;

2. To contract and be contracted with;

3. To have and use a corporate seal, and the same to alter at pleasure;

4. To purchase, possess and dispose of such real and personal property as may be necessary and convenient, to carry into effect the object of the incorporation;

5. To appoint such subordinate officers and agents as the business of the corporation may require, and prescribe their duties and compensation;

6. To make by-laws, not inconsistent with any existing law, for the sale of any portion of its stock for delinquent or unpaid assessments due thereon, which sale may be made without judgment or execution; *provided*, that no such sale shall be made without thirty days' notice of time and place of sale, in some newspaper in circulation in the neighborhood of such company, for the transfer of its stock, for the management of its property, and for the general regulation of its affairs.

SEC. 6. The corporators, or any portion of them, designated by a majority of the whole number, are authorized to open books and receive subscriptions to the capital stock of the corporation; and as soon as such capital stock has been subscribed, they shall give notice to the subscribers to meet at such time and place as they may designate, for the purpose of electing, not less than three, nor more than

seven directors, as the stockholders present shall determine; *provided*, that it shall be lawful in the organization of any corporation, proposing to construct more than ten miles of railroad, to elect a board of directors, as soon as one-half of the capital stock has been subscribed.

SEC. 7. The corporators present at such meeting shall be inspectors of the election, and certify who are elected directors, and appoint the time and place for their first meeting; and each stockholder who shall attend in person or by proxy, appointed by writing, and subscribed by such stockholder, shall be entitled to one vote for each share of capital stock subscribed by him; but after such first election of the directors, no person shall vote on any share upon which any installment or portion thereof is then due and unpaid.

SEC. 8. No person is eligible to the office of director unless he is a stockholder in the corporation and resident of the State, and a director ceasing to be such stockholder or resident, ceases to be a director; *provided*, that corporations constructing railroads in this State, may permit a minority of the Board of Directors to reside out of this State. Before entering upon the discharge of their duties, the directors shall each take and subscribe an oath to faithfully and honestly discharge such duties.

SEC. 9. The directors, when elected and qualified, at the first meeting thereafter, shall elect one of their number president, who shall preside at their meetings and perform such other special duties as the directors may authorize, and at the same time shall appoint a secretary, whose duty it shall be to keep a fair and correct record of all the official business of the corporation. From the first meeting of the directors, the powers vested in the corporation are exercised by them, or by their officers or agents, under their direction, except as otherwise specially provided in this act.

SEC. 10. The notice of the time and place of the first meeting of the stockholders for the election of directors

shall be given by publication of the same, for thirty days before such meeting, in some newspaper, published at least once a week, in the county where the meeting is to be held, or in some newspaper published in like manner and in general circulation therein; *provided*, that nothing herein contained shall be construed to prevent such stockholders from holding such meeting for the election of directors before the expiration of thirty days after such stock is subscribed, and without the publication of the notice above referred to; *provided further*, that all such stockholders shall be present at such meeting or consent thereto in writing, which consent shall be filed with the secretary of such company. All notices of subsequent meetings of stockholders or directors shall be given for such time and in such manner as the directors may prescribe.

SEC. 11. There shall be an annual election of directors, and at each election after the first, the president of the corporation shall act as inspector of election, and certify who are elected directors. The directors chosen shall hold their offices for one year thereafter, and until their successors are elected and qualified. The powers vested in the directors may be exercised by a majority of them.

SEC. 12. Every corporation organized under this act, shall keep a stock book in such manner as to show intelligibly the original stockholders, their respective shares, the amount paid, and the amount due thereon, if any, and all transfers thereof; which stock book, or a certified copy thereof, as to the items in this section specified, shall be subject to the inspection, at all reasonable hours, of any person interested therein and applying therefor.

SEC. 13. The stocks in all private corporations organized under this act, are to be deemed personal property, and subject to attachment, execution, levy and sale, as such; and the corporation, in case of such sale, is required to make the necessary transfer to the purchaser, upon the stock book.

SEC. 14. All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder, or person from whom the same is purchased, and subject such purchaser to the payment of any unpaid balance, due or to become due, on such stock; but if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser.

SEC. 15. If the directors of a corporation declare and pay dividends, when the corporation is insolvent, or which renders it insolvent, or diminishes the amount of its capital stock, such directors shall be jointly and severally liable for the debts of the corporation, then existing, or incurred while they remain in office; or if such directors shall, by any official act or conduct, fraudulently induce any person to give credit to such corporation, they shall be liable in like manner to such person for any loss he may sustain thereby; but any director who voted against such dividend, or such fraudulent act or conduct, if present, or who thereafter as soon as the same came to his knowledge, filed his objections thereto, shall be exempt from such liability.

SEC. 16. Any corporation organized under this act, which does not elect directors and commence the transaction of the business for which it was formed, within one year from the time of the filing of the articles of incorporation shall thenceforth be divested of its corporate powers, and if such corporation shall, for any period of six months after the commencement of its business, neglect and cease to carry on the same, its corporate powers shall also cease.

SEC. 17. All corporations that expire by the limitation specified in their articles of incorporation, or are annulled for forfeiture or other cause by the judgment of a Court, continue to exist as bodies corporate for the period of five years thereafter, if necessary, for the purpose of prosecuting or defending actions, suits or proceedings, by or against them, settling their business, disposing of their property and dividing their capital stock, but not for the purpose of continuing their corporate business.

SEC. 18. The stockholders of any private incorporation heretofore incorporated by any special act of the Legislature, may at any time hereafter, while such corporation exists, incorporate themselves under this act, in the mode herein prescribed, for the purpose of carrying on the enterprise, business, pursuit, or occupation, for which they may have been specially incorporated; and the filing of the articles of incorporation shall be deemed a surrender of such special incorporation, but not of any vested right thereunder, and thereafter such corporation shall have the powers and privileges, and be subject to the liabilities and limitations provided by this act, and not otherwise.

SEC. 19. Any corporation organized under the provisions of this act may, at any meeting of the stockholders which is called for such purpose, by a vote of the majority of the stock of such corporation, increase or diminish its capital stock or the amount of the shares thereof, or authorize the dissolution of such corporation and the settling of its business and disposing of its property and dividing its capital stock; *provided, however*, that the capital stock of any corporation formed under this act, except corporations formed for the purpose of making and constructing a railroad, shall never exceed the sum of two million of dollars, and any corporation that shall violate this provision of this act shall forfeit its corporate rights.

SEC. 20. Any corporation formed for the purpose of navigating any stream or other water, may, by virtue of such incorporation, construct any railroad, macadamized road, plank road or clay road, or canal or bridge, necessary and convenient for the purpose of transporting freight or passengers across any portages on the line of such navigation, occasioned by any rapids or other obstructions to the navigation of such stream or other water, in like manner and with like effect as if such corporation had been specially formed for such purpose; but no corporation formed under this act or heretofore or hereafter incorporated by any special act of incorporation, passed by the Legislative Assembly of this State or otherwise, for the

purpose of navigating any stream or other water of this State, or forming the boundary thereof in whole or in part, nor any stockholder in such corporation, shall ever take or hold stock, or any interest directly or indirectly in the stock of any corporation which may be formed under this act, for the purpose of building or constructing any road in this act mentioned; nor shall any such corporation ever purchase, lease or in any way control such road or the corporate rights of such last-named corporation; *provided further*, that corporations heretofore incorporated or which may hereafter be formed under this act for the purpose of establishing and keeping a ferry across any stream or other water of this State or forming the boundary thereof, in whole or in part, shall not be deemed a corporation for the purpose of navigating such stream or water within the meaning of this act, nor shall the stockholders thereof be restrained from taking or holding stock in a corporation formed under this act for the purpose of constructing or building any road.

SEC. 21. The stockholders may, by a majority vote of the stock, change its general place of business.

SEC. 22. The directors of any corporation may file supplementary articles of incorporation, at any time when a unanimous vote of all the stock subscribed shall so determine, for the purpose of engaging in any new enterprise or business pursuit, not in violation of law, for the purpose of changing any part of the route of their road or canal, or either terminus, or both; the directors shall cause a notice to be published of the filing of such supplementary articles, setting forth the object of the same.

SCHEDULE B.

TITLE II.

Corporations, when authorized to appropriate land for corporate purposes.

SEC. 23. A corporation organized for the construction of any railroad, macadamized road, plank road, clay road, canal or bridge, shall have a right to enter upon any land between the termini thereof, for the purpose of examining, locating and surveying the line of such road or canal, or the site of such bridge, doing no unnecessary damage thereby.

SEC. 24. Such corporation may appropriate so much of said land as may be necessary for the line of such road or canal, or the site of such bridge, not exceeding sixty feet in width, besides a sufficient quantity thereof for toll-houses, workshops, materials for construction, timber excepted, a right of way over adjacent lands to enable such corporation to construct and repair its road, canal or bridge, and to make proper drains; and in the case of a railroad, to appropriate sufficient quantity of such lands, in addition to that specified in this section, for the necessary side tracks, depots and water stations, and the right to conduct water thereto by aqueduct; but no such appropriation of private property shall be made until compensation therefor be made to the owner thereof, irrespective of any increased value thereof, by reason of the proposed improvement by such corporation, in the manner hereinafter provided.

SEC. 25. Any corporation may change the grade or location of its road or canal, not departing from the general route specified in the articles of incorporation, for the purpose of avoiding annoyances to public travel or dangerous or deficient curves or grades, or unsafe or unsubstantial grounds or foundation, or for other like reasonable causes, and for the accomplishment of such change shall have the same right to enter upon, examine, survey and appropriate

the necessary lands and materials, as in the original location and construction of such road or canal.

SEC. 26. When it shall be necessary or convenient in the location of any road herein mentioned, to appropriate any part of any public roads, street or alley, or public grounds, the County Court of the county wherein such road, street, alley or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms and conditions upon which the same may be appropriated or used, and occupied by such corporation; and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient, in the location and construction of said road.

SEC. 27. Whenever a private corporation is authorized to appropriate any public highway or grounds, as mentioned in the last section, if the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street or alley, or public grounds, within such town, as the local authorities mentioned in the last section, and having charge thereof, shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time, when requested, such corporation may make such appropriation without reference thereto.

SEC. 28. Whenever such public highway or grounds is taken by a private corporation by agreement with the local authorities mentioned in section 26, such corporation may place such gates thereon, and charge and receive such tolls thereat, as such local authorities may consent to by such agreement and none other; but when the same is appropriated without such agreement, as provided in section 27, such corporation shall not place any gate or other obstruction upon the public highway or grounds appropriated, nor charge or receive any toll from any person passing over or along the same.

SEC. 29. Any road, other than a railroad, constructed by a corporation formed under this act, shall be cleared of standing timber for thirty feet in width of said road, and shall have a track in the centre not less than sixteen feet wide, finished and kept in good traveling condition, except where the cutting on said road is six feet or more deep on either side, in which case such track need not be more than ten feet wide, with turnouts of sixteen feet in width for every quarter of a mile of such narrow track.

SEC. 30. All streams or other waters upon the line of such roads, shall be safely and securely bridged, except where the County Court of the county wherein the line of such road may cross such streams, or other water, or if such stream or other water form the boundary between two counties, then the County Court of either of said counties may authorize the corporation to place a ferry-boat upon such stream or other water, to be kept and run for such toll as the County Court may prescribe, and in the manner required of ferries established under the general statutes in relation to ferries; or except where such County Court may authorize such corporation to connect their road with a ferry, now or hereafter established over such stream or other water under the general statute in relation to ferries.

SEC. 31. Whenever a road of any kind herein mentioned, other than a railroad, is completed, or any particular section of it, fit for public travel, the corporation shall give notice thereof, by publication in some newspaper of general circulation, along the line of such road or section, or by posting notices along the line of such road or section, or by posting notices along such line in some conspicuous places, not less than five miles apart, and thereafter such road or section thereof is a common highway, so that every person with his stock and vehicles of every description may travel thereon upon the payment of the tolls prescribed by the corporation, subject to the power of the corporation, by giving notice thereof in like manner, to suspend such right of travel upon all or any portion of

such road, for a reasonable time, to enable it to make any necessary repairs or improvements thereon.

SEC. 32. A corporation shall only collect and receive toll on its road at a gate established thereon, and such shall be plainly and specifically printed or written upon a signboard, posted at such gate, in plain view of the travel on the road; but such corporation shall not establish any gate within the limits of any town, whether incorporated or not, or within one-half mile of the limits of such town, except as specially provided in section 28; but no person traveling on foot, or going in any manner or with any property, from one part of his farm to another part, or going to or from church, funerals or elections, is liable to pay for traveling upon such roads.

SEC. 33. Any person traveling upon any road herein mentioned, who shall pass through a gate thereon, without paying the toll legally chargeable thereat, or who shall go round such gate, with the intent to avoid the payment of such toll, shall be liable to the corporation for three times the amount thereof, and any corporation which, by its agents or servants, or in any manner shall illegally collect any toll from any person traveling on such road, shall be liable to such person for three times the amount thereof.

SEC. 34. Any bridge constructed by a corporation formed under this act, when completed and fit for public travel, and notice thereof is posted in some conspicuous place on such bridge, or by publication in a newspaper, as in the case of a road, is a common highway within the meaning, and subject to the conditions specified in section 31, as to roads, and subject to the further power of the corporation to prescribe, by advertisement in some conspicuous place on such bridge, the rate of speed anyone may travel on such bridge.

SEC. 35. A corporation may collect or receive such tolls for crossing its bridge as may be plainly written or printed upon a signboard, posted in some conspicuous place on

such bridge, but no person not liable to pay toll on a road, as provided in section 32, is liable to pay toll for crossing such bridge; and any person who shall pass over such bridge without paying the toll legally chargeable thereat, or any corporation which shall illegally collect any toll from any person crossing such bridge, shall be respectively liable to each other for three times the amount of such toll as provided in section 33, in case of roads.

SEC. 36. Every corporation formed under this act for the construction of a railroad, as to such road shall be deemed common carriers, and shall have power to collect and receive such tolls or freights for transportation of persons or property thereon as it may prescribe.

SEC. 37. It shall be the duty of every incorporation organized for the construction of any macadamized road, plank road, clay road or bridge, to keep an accurate statement or account of the moneys expended by said corporation, in the construction of any such road or bridge, and keeping the same in repair, including any sums paid for lands, appropriated as necessary for said corporation, which statement or account shall be verified at the time of the annual meeting held for the election of directors, by the president of the said corporation, or one of the directors thereof, to the effect that he believes the said account to be just and correct, and a copy of such verified account shall, within ten days after such annual election, be deposited with the clerk of the county with whom the articles of incorporation are filed. Said corporation shall also keep an accurate account of the tolls received for traveling upon said road or bridge, or of other profits accruing to said corporation, which account shall be verified in like manner, and a copy thereof deposited with said county clerk within ten days after such annual election.

SEC. 38. At any time after the expiration of ten years from the time of taking tolls on any macadamized road, plank road, clay road or bridge, it shall be lawful for the County Court of any county through which any such

road, or part thereof, shall pass, or in which such bridge may be situated, to pay to such corporation the amount of money expended by it in the construction of such road or bridge, and keeping the same in repair, and all other necessary expenses, including any sums paid for lands appropriated by such corporation, together with interest on said account, and sums of money at the rate of twenty per centum per annum, after deducting from said amount the tolls and other profits annually received by said corporation, and after the payment of the amounts expended in constructing and keeping in repair said road or bridge, and other necessary expenses incurred in and about the same, and interest thereon, less the amount received by such corporation, the said road or bridge shall become free for public travel.

SEC. 39. The foregoing section shall not be construed so as to prohibit said County Court, at any time before the expiration of said period of ten years, from purchasing said road or bridge, for any sum that may be agreed upon by said County Court and corporation.

SCHEDULE C.

AN ACT to Grant the Oregonian Railway Company, Limited, the Right of Way and Station Grounds over the State Lands and Terminal Facilities upon the Public Grounds at the City of Portland.

WHEREAS, It is of great importance to the people of the State of Oregon, and of great and lasting advantage to them, to secure the building of competing lines of railways in this State, and to secure the building of a railway from this State to a connection with some railway or railways having a through railway connection with those States and Territories of the United States situate east of the Rocky Mountains, and thus to secure cheap transportation for the products of this State to such point or to such points as are accessible to sea-going vessels for shipment to foreign countries, and procuring emigration to and the sale and settlement and cultivation of the large bodies of land owned by the State, at this time unsettled and cultivated; and

WHEREAS, The Oregonian Railway Company, Limited, is now engaged in the construction of a system of railways in the State of Oregon, from the City of Portland, the most used shipping port in this State, to the head of the Willamette Valley, and to a connection with the system of railroads having a connection with those States and Territories of the United States situate east of the Rocky Mountains, and the building of the railway of said company will be of great benefit and lasting advantage to the people of this State; and

WHEREAS, To prevent the expense of cartage and other expenses of transporting and handling freight which must be borne entirely by the producers of the State of Oregon, it is necessary that any railroad having its terminus and general depot at the City of Portland, should have such depot an the bank of the Willamette River, at ship-water, with wharf privileges for the ready and econ-

omical shipping of freight by and from sea-going vessels; and

WHEREAS, There is no portion of the City of Portland where equal facilities can be had for the establishment of a railway depot, or where the establishment of a railway depot would cause less damage to the citizens and to the City of Portland by the occupation of streets by railway track, cars and engines than the property situate in said city and generally known as the public levee, and the said public levee property is convenient and necessary for use as the general depot of the railway of said Oregonian Railway Company, Limited, at said City of Portland; and

WHEREAS, The said property known as the public levee, hereinafter described, is public ground, and under the control of the people of the State of Oregon, acting by and through the Legislative Assembly of said State; and

WHEREAS, The streets and public highway in the City of Portland, and public lands in the State of Oregon other than those belonging to the United States, are public property and for the use and benefit of the people of the State of Oregon, and under their control, acting by and through the Legislative Assembly of said State; now therefore,

Be it enacted by the Legislative Assembly of the State of Oregon:

That thereby (be) and is hereby granted to the Oregonian Railway Company, Limited, a corporation at this time engaged in the construction and operation of a railway in the State of Oregon, and to its assigns, the owners and operators of the railway, in the construction, use and operation thereof, the rights, privileges, easements and property following, that is to say:

SECTION 1. Those certain premises situate in the City of Portland, in the State of Oregon, and commonly known as the public levee, and being the same property donated and conveyed to the City of Portland, Oregon, for a public levee by deeds from Stephen Coffin and others, dated

January 19, 1865, and recorded January 23, 1865, and dated July 26, 1871, and recorded July 27, 1871, and as mapped, recorded and dedicated to public use as a public levee by map and ordinance of the City Council of the City of Portlandt, recorded March 6, 1869, together with all streets or parts of streets, or part of any street of the said City of Portland which may be included in the boundaries of said public levee, and the right to the use and occupation of the Willamette River adjacent thereto, to a sufficient distance to obtain a depth of water sufficient for the navigation of the largest size of sea-going vessels coming to the City of Portland, or if the ordinary and usual wharf line established by the City of Portland, shall be beyond and further out into the stream of said river than sufficient to obtain a depth of water sufficient for the navigation of the largest size of sea-going vessels coming to the City of Portland, then to the extent of such ordinary and usual wharf line established by said City of Portland; to be held, used and enjoyed for occupation by track, side track, water stations, depot buildings, wharves and warehouses, and such other buildings and erections of such form and manner of construction as may be found requisite, necessary or convenient in the receiving, shipping and storing of produce, goods, wares, merchandise and generally of all kinds of freight, and for use generally and in the manner usual and ordinary for depot purposes, and as such to be under the exclusive management and control of the owners of said railway;

Provided, always, That the said Oregonian Railway Company, Limited, or its assigns, shall have no power to sell, convey or assign the premises or rights hereby granted, or any part or parcel thereof, to any person, persons, firm or corporation, save only with and as part and parcel of, and as appurtenant to the railway now built and owned by said company, and now in process of construction by it; and that the premises and rights in this section granted, shall be wholly forfeited if the said railway shall not be completed from that portion of said rail-

way now constructed or in process of construction on the east and west sides of the Willamette River, in the Willamette Valley, in this State, to the said premises, the use of which is herein granted on or before the first day of January, A. D. 1882, subject, nevertheless, to the further provision that if said company shall, by any unforseen accident, be prevented from completing said railway as aforesaid on or before the first day of January, A. D. 1882, that if the said company shall at that time be actively engaged in the completion of said railway as aforesaid, and shall have, on or before said first day of January, A. D. 1882, placed erections on said premises, of the value of ten thousand dollars, then, and in that case, the time for the completion of said railway shall be extended to the first day of July, A. D. 1882; *Provided, always*, That nothing in this act shall be so construed as to take away any pecuniary or property rights which the City of Portland may lawfully have, in said premises as a municipal corporation, and which the States may not lawfully appropriate in this act, nor to deprive the said city of any legal claim or remedy it may have to damages in consequence of the appropriation of said public levee as herein provided; and that said company shall never charge dockage to any boat, ship or vessel, while engaged in receiving or discharging cargo at the wharf which may be erected on said premises.

Passed over the Governor's veto, and filed in the office of the Secretary of State, October 22d, 1880.

SCHEDULE D.

SEC. 40. The county court of any county in this State may grant a license to any person, entitled and applying therefor, to keep a ferry across any lake or stream within its respective county, upon being satisfied that a ferry is necessary at the point applied for, which license shall continue in force for a term to be fixed by the Court, not exceeding five years.

SEC. 47. Whenever the county court of any county shall grant a license to keep a ferry across any lake or stream, such Court shall establish the rates of ferriage which may be lawfully demanded for the transportation of persons and property across the same, having due regard to the breadth and situation of the stream, and the dangers and difficulties incident thereto, and the publicity of the place at which the same shall have been established; and every keeper of a ferry, who shall at any time demand and receive more than the amount so designated for ferrying, shall forfeit and pay to the party aggrieved, for every such offence, the sum of five dollars, over and above the amount which shall have been illegally received, to be recovered before any Justice of the Peace having jurisdiction.

SEC. 53. Any person who shall maintain any ferry, and receive ferriage, without first obtaining a license for the same, shall pay a fine of ten dollars for each offense, to be collected for the use of the county, by suit, before any Justice of the Peace having jurisdiction; and any person is hereby authorized to bring such suit; *Provided*, That it shall not be considered unlawful for any person to transport any other person or his property over any stream for hire, when it shall be made evident that there is no ferry, or that the ferry established at such place was not in actual operation at the time, or in sufficient repair to have afforded to such person or his property a safe and speedy passage.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

No. ~~[illegible]~~ 275

THE OREGON RAILWAY AND NAVIGATION COMPANY,
Plaintiff in Error,

vs.

THE OREGONIAN RAILWAY COMPANY (LIMITED).

AUXILIARY BRIEF FOR PLAINTIFF IN ERROR.

S. BARTLETT,
Of Counsel for Plaintiff in Error.

EVENING POST JOB PRINT.

Supreme Court of the United States,

OCTOBER TERM, 1887.

No. 922.

THE OREGON RAILWAY AND NAVIGATION COMPANY,
Plaintiff in Error,

vs.

THE OREGONIAN RAILWAY COMPANY, LIMITED.

AUXILIARY BRIEF FOR THE APPELLANT.

In appellant's view the cause presents three questions:

I.—Did the general laws of Oregon in relation to the formation of private corporations, existing at the date of the lease in question, copies of which (chap. 7, Title I. and II.), marked Schedules "A" and "B," are hereto subjoined, authorize the formation of railway corporations free from the restraints as to alienation by lease or otherwise, which upon grounds of public policy are uniformly held to be inseparable from that class of corporations, unless in definite terms of the law or charter, or by necessary implication, they are exempt from all such restraints?

II.—Is there to be found in any other legislation of Oregon, either general or special, anything which by itself, or in connection with the general law, exempts either the appellee in this case, or the appellant, or both, from the restraints as to alienation by lease which the law would otherwise impose?

III.—If the lease upon which this suit is founded (which seeks not the recovery of rent for past enjoyment by the lessee, but the further execution of the terms of the lease after its disaffirmance and surrender of possession by the lessee), is by law invalid, is there any principle of law which precludes the lessee from setting up in such suit by way of defense that invalidity?

I.

In dealing with the first of these questions it is fit to place in the forefront the doctrine of this Court settled after repeated discussion as to the power of railway corporations to lease their roads. The rule, as well as its foundation in public policy, is stated with fullness in Thomas *v.* R. R. Co., 101 U. S., p. 71. Its final restatement with all its qualifications is tersely given in Penn. Co. *v.* St. Louis and A. Road, 118 U. S., p. 309, and we reproduce it as follows:

"We think it may be stated, as the just result of these cases and on sound principle, that *unless specially authorized by its charter, or aided by some other legislative action* a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor can any other railroad company without similar authority make a contract to receive and operate such road, franchises, and property of the first corporation, and that such a contract

is not among the ordinary powers of a railroad company, and *is not to be presumed from the usual grant of powers in a railroad charter.*"

With this doctrine in view, the statute above referred to is to be scanned to find if from the fact that among the corporations it authorizes to be formed by the voluntary association of three or more persons, it distinctly names railway companies with peculiar provisions applicable to such corporations, or if from any other of the provisions of the act, it either in terms or by necessary implication, excepts such railway corporations from the restraint against alienation by lease, which, in all other cases of such corporations (without any distinct or indistinct provisions whatever in that respect), by law attaches to them.

Postponing, for the present, an examination of the peculiar features of the judgment of the learned Circuit Court, which, in substance, holds that this statute creates "free trade in corporations and free corporations" (including railways), we proceed to examine the legislation in scope and in detail.

The original statute was passed October 14, 1862 (General Laws, Ed. 1866), four months after the "English Company's Act of 1862," which authorizes "any seven or more persons associated for any lawful purpose" to form themselves into a corporation. Its general scope and design is to provide by law for the formation of corporations by articles of association for the purpose of engaging in "any lawful enterprise, business, pursuit or occupation." It recognizes, subdivision 6, section 4, railways as one of the enterprises which may be incorporated under its provisions; and it requires that the termini of such roads shall be set forth in their articles of association. The general powers of corporations thus organized are defined in section 5, and are confined to the ordinary powers to sue and be sued, purchase and dispose of such real and personal estate as may be necessary and convenient to carry out its purposes, and appoint officers and prescribe their duties. Thus far there is nothing in the

act which recognizes as to railway corporations the power to lease, and it is confidently submitted that in no one of the remaining sections of the act, except the 20th section, which is reserved for future discussion, is there any provision which, by a strained construction even, can be held to confer the power. It has been attempted to derive this power from the 19th section which gives to a majority of the stockholders the power by vote "to authorize the dissolution of the corporation and the settlement of its business, the disposing of its property and the dividing its capital stock in any way which may seem proper." Hence it has been stated that the power of sale has been conferred, and if so, the lesser power to lease is granted by implication. This overlooks the feature that the power of sale is confined to the property of the corporation and does not embrace its franchises, and even this power of sale is limited to the case of a "dissolution of such corporation" which imports the destruction and surrender—not transfer—of all its franchises. Indeed, this section, like others, is inapplicable to railway corporations which are established with the right of eminent domain, and sustain quite different relations from those of trading corporations to the Government and public. They are provisions inserted with a view to the uses and necessities of the latter class of corporations authorized by the act.

Thus far as to the general provisions of the act conferring powers on corporations created under it without any expressed discrimination between the classes of corporations to which they are to be made applicable. The Act, under Title II. of the chapter, proceeds to make distinctive provisions applicable to railways and other *quasi* public corporations and as to their powers, and those provisions must be examined to find if directly, or by implication, they confer the power to transfer by way of lease to other corporations the right to exercise for a term of years their franchises.

Turning then to the provisions of that title it will be seen that by its numerous sections it confers on railways the right of eminent domain "the right to locate over pub-

lic roads, the right to change locations and grades, and the right to collect and receive such tolls and freights for transportation of persons and property thereon, as it may prescribe." It will hardly, we think, be contended that these provisions embrace the power to lease.

Before proceeding to find if there be any other legislation of Oregon affecting the question of the right of its railways to lease their roads and franchises, it becomes proper to refer to the judgment of the learned Circuit Court upon the construction of the General Statute in question.

That construction is to be found in the part of the judgment (Record, pp. 92–3) which deals, not with the right of the lessor company to make the lease, but of the lessee to accept it, and seemingly it rests largely upon a misconception of the character and effect of the "English Company's Act of 1862" to which it refers as being similar to the Oregon Act. It declares (p. 92) as to railways organized under the Oregon Act that "subject to the provisions and limitations of the Act the articles of association are the charter of the corporation, and in the prosecution of its undertaking and the *management and disposal of its property it is not subject to any other restraint than that* "*which the law may impose in the case of natural persons* "in like circumstances and *whatever is not generally for-* "*bidden* by the law of the land *may be undertaken by a* "*corporation thus formed* for the purpose. * * * * "The Oregon system may succinctly be defined as free "trade in corporations and free corporations."

The repugnancy of such views to the doctrine of this Court applicable to railways whose charter is silent as to the power to lease, or to railways formed under general law where that general law is in like manner silent, needs no discussion on the part of the appellant.

Now the English Company's Act of 1862 thus referred to does not embrace domestic railway corporations. Such corporations are the subject of special and various statutes defining their powers and regulating their administration. (See Brown and Theobald, Law of Railway Corporations,

pp. 492–510–502-- and as to the invalidity of leases, unless allowed by special Act, pp. 322–337). Indeed it may be doubtful whether the organization of the Oregonian Company could itself be maintained except upon the ground that the leasing of foreign railways may be held to be "a lawful purpose" under the Company's Act of 1862. (See Buckley; Law and Practice under Company's Acts, p 5.)

II.

Turning next to the second of the above questions, namely, whether there be any general or special legislation of Oregon, other than that already referred to, which confers on its railways generally, or the Oregonian Railway specially, the power to make or accept leases, we think it may be assumed that all such legislation, if it exists, is to be found stated or referred to in the judgment of the learned Circuit Court, whose author had been by law made the compiler of the statutes.

Now in that judgment the legislation referred to (which, aside from the construction of the general act as a whole, which declares that the act constitutes in Oregon free trade in corporations and free corporations), relied on by this Court may be stated as follows:

1. The power conferred by the 19th section of the General Act to wind up and dispose of the property of a corporation which it is declared, since it embraces power to sell by necessary implication, confers also the power to lease. This proposition we have already discussed.

2. The 20th section of the General Act, as it stood before its re-enactment in 1878 (Exhibit A, p. 18), which provides that a certain class of corporations, namely, those formed for the purpose of "*navigating any stream or*

other water of the State," shall not "hold directly or indirectly any stock in any railway, nor shall any such corporation purchase, lease or control any such road." From this provision applicable to this class of corporations, the learned Court declares that the "rational and the *legal* inference is that all leases of roads taken by a corporation formed under the act, except the kind thereby specially prohibited, are permitted." And further, the judgment in substance declares that since this provision of section 20th was omitted in the revision of the section under the Act of October 18, 1878, it removes the inhibition even as to the class of corporations engaged in navigation, and thus announces the general doctrine that in Oregon its corporations have the power to lease and accept leases. We subjoin a copy of the Act of October 18, 1878 (see Schedule C). The 20th section of the General Act, as it stood up to October 18, 1878, has already been annexed.

It may be admitted that the prohibition to one class of corporations to grant or receive leases to or from a different class of corporations (namely railways), indicates either the fact, or the fear, that, but for such prohibition, the power to make such leases would exist *as between those two classes* of corporations, *and those only*, and not that leases between railway corporations were legal and valid. Further, in this case the fact or fear that corporations existing for the purpose of navigating the waters of the State may have had in their charters what might be held to be the right to lease railways, may well explain the purpose of the inhibition, since it is obvious that the prohibition was aimed, among others, to corporations of that class "*heretofore* (or hereafter) formed by any *special act of incorporation.*" But, be this as it may, it is submitted that the extraordinary deduction made by the Court from this section of the act can hardly be maintained if the doctrine of the recognition of a supposed right either in subsequent legislation, or in the doubtful provisions of the same legislation, be as stated by this Court in Thomas *vs.* The R. R. Co.

3. The only other legislation relied on in the judgment is special, and confined to the Oregonian Railway Company, namely, the act of October 22d, 1880.

The title to this act is "An act to grant the Oregonian Railway Company, limited, the right of way and station grounds over State lands and terminal facilities upon public grounds at the City of Portland." The terms of the grant are to that company "at that time engaged in the construction and operation of a railway in the State of Oregon, and to the assigns, owners and operators of the railway now being constructed by it, and for the uses of said railway in the uses and operation thereof." The proviso of the act is as follows: "Provided always, that the said Oregonian Railway Company (limited) or its assigns shall have no power to sell, convey or assign the premises or rights hereby granted or any part or parcel thereof to any person, persons, firm, firms or corporation, save only with and as part and parcel of and as appurtenant to the railway now built and owned by said company and now in process of construction by it."

The judgment of the learned Circuit Court declares (p. 91) that the effect of this act "is clearly to establish, so far as this State and Court is concerned, the legal right of the plaintiff to control and operate this road, and in my judgment to *dispose of it either absolutely or for a term of years.*"

Now, to so much of this declaration as asserts that the act establishes the legal right of the plaintiffs to construct and operate their road in Oregon, it is erroneous. Such power had already been granted by the Act of October 21, 1878, by which (as is declared in another part of the judgment, p. 91) "this corporation was placed on the footing "of a domestic corporation in Oregon, with, as declared "by the act," "the same rights, powers and privileges as a domestic corporation formed for such purpose *and no more.*" Unless, therefore, the general law for the formation of corporations established as to railways, "free trade in corporations and free corporations," then by the use of the words "*and no more*" any powers which might other-

wise be derived from foreign charters are in terms expressly excluded.

But the other declaration in the judgment that the effect of this act granting terminal facilities to the Oregonian Railway Company "is to establish the legal right of the plaintiffs to dispose of (its road) either absolutely or for a term of years," demands investigation. That such right had been expressly excluded as to all foreign corporations by the above-cited Act of Oct. 21, 1878, would seem to be clear; if, then, this former policy of the State is to be held to have been abandoned as to the Oregonian Company by the act in question, it surely ought to result, not from doubtful implication, but from clear and direct provision. If any implication, which would be otherwise doubtful, can be disposed of by showing that the terms of the act which raise the doubt are capable of solution as applicable to other eventualities referred to in the general law, then the implication must be held not to exist.

Now, as has already been seen, the general law for the creation of corporations by its 19th section provides for the dissolution of all corporations at the will of their shareholders, and for disposing of their property and dividing their capital stock. Under this section sales of property might be *either in whole or by piecemeal.* Possibly, too, the change of the terminus of the road might be found desirable and authorized by law, and thus the old terminal grounds be sold. The object of the act in question was to meet all possible contingencies, and to allow no disposition of the granted premises under any existing or future legislation which did not knit the terminals to the railroad.

But this is not all. If the act in question is to be construed as an attempt by the Legislature to impart to the Oregonian Company the new and additional franchise to lease its road, such grant would violate the Constitution of Oregon which provides that "corporations may be formed under general laws but shall not be created by special act except for municipal purposes." That a grant of powers to an especial railway company to dispose of or

lease its franchises would (in the language of this Court in Wallace *v.* Loomis, 97 U. S., 146), be a grant in which "new corporate powers or franchises were created," and thus a violation of the constitutional provisions can hardly be doubted. This would seem to be settled by School District *v.* Ins. Co., 103 U. S., p. 70, where the doctrine is discussed and settled.

III.

As to the last of the above questions, namely, whether if the lease be illegal the appellant is precluded from setting up that illegality, the affirmative of which is declared by the judgment of the learned Circuit Court "after not a little confusion and uncertainty on the subject," to be the final conclusion reached by the Court and by text-writers (p. 90), we have to submit.

The proposition thus maintained by the Court is that "the law is well settled that a person who contracts with an apparent corporation as such is estopped when sued on such contract to say that the plaintiff had no corporate existence or power to make such contract. A corporation like an individual when sued on a contract may set up as a defense to the action its want of power to make such contract. but the party with whom it contracts can not set up such want of power or capacity as a defense to an action by the corporation for a breach" (p. 89).

To such a proposition we answer:

1st. That even in the cases referred to by the learned Court or by the text-writer, on whom seemingly it relies, which are exclusively cases of contracts mere *ultra vires*, and not contracts void as against public policy, the doctrine has no foundation in principle nor in the analogy upon which it is sought to be rested.

2d. That however this may be, yet, even in the judgment of the learned Court, the supposed doctrine has no application to a contract illegal as repugnant to public policy. The contract whose validity is now in controversy has been declared by this Court and numerous other judicial tribunals to be thus repugnant and absolutely void.

As to contracts merely *ultra vires* this asserted doctrine cannot be made to rest on any of the grounds pertaining to estoppels. The principle of mutuality is entirely wanting, and no estoppel *in pais* can effect the O. R. and N. Co. on the ground that it has misled to its injury the Oregonian Co. in regard to its legal powers to grant such a lease. In the view of the learned Circuit Court the doctrine rests on the analogies furnished by the case of infancy which precludes any one but the infant from setting up the disability. That such an analogy lacks force is obvious when it is considered that the contract of an infant is voidable and not void, and may be ratified and enforced by him, but the attempted contract between corporations *ultra vires* is no contract. Neither party has the infant's privilege to ratify and enforce it. It is under all circumstances incapable of being enforced by either party *while executory*, although perhaps after its complete fulfillment expenditures made in such fulfillment may be recovered.

The case of Cowell *v.* Springs County, 100 U. S., 55, cited by the learned Court, it is submitted, does not touch the question. The principle at stake is thus dealt with in 8th G. and J., 248-319, Penn. Navigation Co. *v.* Dunbridge: "To the doctrine of estoppel applied to such cases we cannot yield our assent. If the corporation is estopped from denying its powers the estoppel operates with like effect upon those who contract with them, and the result would be that no matter how limited the design and powers of a corporation may appear in its charter, *practically it is a corporation without limitations as to its powers.* Such a doctrine at this day is dangerous to the interests of the community and at war with modern decisions upon the subject."

That an unauthorized contract by a railway company to dispose of its franchises for a term of years is utterly void as repugnant to public policy has been declared with emphasis by this Court in Thomas *vs.* West Jersey R. R. Co., 101 U. S., p. 86, and it is needless to cite the numerous authorities which support that view.

The learned Circuit Court admits, pp. 93-94, that "whatever a corporation is forbidden to do either directly by "statute or a public policy fairly indicated by, or deducible "from, a legislation of a State or country or the decisions of its courts, or both, is, of course, beyond its power "to do. In such case the act is not only beyond the power "the corporation and therefore invalid, but it is prohibited "and therefore illegal and incapable of ratification."

Whether the learned Court has been able to extricate the present lease from the application of this sound principle upon the grounds substantially that in Oregon there is by statute "free trade in corporations and free corporations" has heretofore been discussed in this brief, and the appellant has nothing to add to the discussion.

S. BARTLETT,
Of Counsel for Plff. in Error.

SCHEDULE A.

Laws of Oregon (Deady's Comp.) 1864.

CHAPTER VIII.

TITLE I.

General Provisions in Relation to the Formation of Private Corporations.

SECTION 1. Whenever three or more persons shall desire to incorporate themselves, for the purpose of engaging in any lawful enterprise, business, pursuit or occupation, they may do so in the manner provided in this act.

SEC. 2. Such persons shall make and subscribe written articles of incorporation in triplicate, and acknowledge the same before any officer authorized to take the acknowledgment of a deed, and file one of such articles in the office of the Secretary of State, another with the clerk of the county where the enterprise, business pursuit or occupation, is proposed to be carried on, or the principal office or place of business is proposed to be located, and retain the third in the possession of the corporation.

SEC. 3. The articles of incorporation, or a certified copy of the one filed with the Secretary of State or the County Clerk, is evidence of the existence of such corporation.

SEC. 4. The articles of incorporation shall specify:

1. The name assumed by the corporation, and by which it shall be known, and the duration of the corporation, if limited;

2. The enterprise, business, pursuit or occupation in which the corporation proposes to engage;

3. The place where the corporation proposes to have its principal office or place of business;

4. The amount of the capital stock of the corporation;

5. The amount of each share of such capital stock;

6. If the corporation is formed for the purpose of navigating any stream or other water, or making or construct-

ing any railroad, macadamized road, plank road, clay road, canal or bridge, the termini of such navigation, road canal or the site of such bridge.

SEC. 5. Upon the making and filing of the articles of incorporation as herein provided, the persons subscribing the same are corporators, and authorized to carry into effect the objects specified in the articles, in the manner provided in this act; and they and their successors, associates and assigns, by the name assumed in such articles, shall thereafter be deemed a body corporate with power:

1. To sue and be sued;

2. To contract and be contracted with;

3. To have and use a corporate seal, and the same to alter at pleasure;

4. To purchase, possess and dispose of such real and personal property as may be necessary and convenient, to carry into effect the object of the incorporation;

5. To appoint such subordinate officers and agents as the business of the corporation may require, and prescribe their duties and compensation;

6. To make by-laws, not inconsistent with any existing law, for the sale of any portion of its stock for delinquent or unpaid assessments due thereon, which sale may be made without judgment or execution; *provided*, that no such sale shall be made without thirty days' notice of time and place of sale, in some newspaper in circulation in the neighborhood of such company, for the transfer of its stock, for the management of its property, and for the general regulation of its affairs.

SEC. 6. The corporators, or any portion of them, designated by a majority of the whole number, are authorized to open books and receive subscriptions to the capital stock of the corporation; and as soon as such capital stock has been subscribed, they shall give notice to the subscribers to meet at such time and place as they may designate, for the purpose of electing, not less than three, nor more than

seven directors, as the stockholders present shall determine; *provided*, that it shall be lawful in the organization of any corporation, proposing to construct more than ten miles of railroad, to elect a board of directors, as soon as one-half of the capital stock has been subscribed.

SEC. 7. The corporators present at such meeting shall be inspectors of the election, and certify who are elected directors, and appoint the time and place for their first meeting; and each stockholder who shall attend in person or by proxy, appointed by writing, and subscribed by such stockholder, shall be entitled to one vote for each share of capital stock subscribed by him; but after such first election of the directors, no person shall vote on any share upon which any installment or portion thereof is then due and unpaid.

SEC. 8. No person is eligible to the office of director unless he is a stockholder in the corporation and resident of the State, and a director ceasing to be such stockholder or resident, ceases to be a director; *provided*, that corporations constructing railroads in this State, may permit a minority of the Board of Directors to reside out of this State. Before entering upon the discharge of their duties, the directors shall each take and subscribe an oath to faithfully and honestly discharge such duties.

SEC. 9. The directors, when elected and qualified, at the first meeting thereafter, shall elect one of their number president, who shall preside at their meetings and perform such other special duties as the directors may authorize, and at the same time shall appoint a secretary, whose duty it shall be to keep a fair and correct record of all the official business of the corporation. From the first meeting of the directors, the powers vested in the corporation are exercised by them, or by their officers or agents, under their direction, except as otherwise specially provided in this act.

SEC. 10. The notice of the time and place of the first meeting of the stockholders for the election of directors

shall be given by publication of the same, for thirty days before such meeting, in some newspaper, published at least once a week, in the county where the meeting is to be held, or in some newspaper published in like manner and in general circulation therein; *provided*, that nothing herein contained shall be construed to prevent such stockholders from holding such meeting for the election of directors before the expiration of thirty days after such stock is subscribed, and without the publication of the notice above referred to; *provided further*, that all such stockholders shall be present at such meeting or consent thereto in writing, which consent shall be filed with the secretary of such company. All notices of subsequent meetings of stockholders or directors shall be given for such time and in such manner as the directors may prescribe.

SEC. 11. There shall be an annual election of directors, and at each election after the first, the president of the corporation shall act as inspector of election, and certify who are elected directors. The directors chosen shall hold their offices for one year thereafter, and until their successors are elected and qualified. The powers vested in the directors may be exercised by a majority of them.

SEC. 12. Every corporation organized under this act, shall keep a stock book in such manner as to show intelligibly the original stockholders, their respective shares, the amount paid, and the amount due thereon, if any, and all transfers thereof; which stock book, or a certified copy thereof, as to the items in this section specified, shall be subject to the inspection, at all reasonable hours, of any person interested therein and applying therefor.

SEC. 13. The stocks in all private corporations organized under this act, are to be deemed personal property, and subject to attachment, execution, levy and sale, as such; and the corporation, in case of such sale, is required to make the necessary tranfer to the purchaser, upon the stock book.

SEC. 14. All sales of stock, whether voluntary or otherwise, transfer to the purchaser all rights of the original holder, or person from whom the same is purchased, and subject such purchaser to the payment of any unpaid balance, due or to become due, on such stock; but if the sale be voluntary, the seller is still liable to existing creditors for the amount of such balance, unless the same be duly paid by such purchaser.

SEC. 15. If the directors of a corporation declare and pay dividends, when the corporation is insolvent, or which renders it insolvent, or diminishes the amount of its capital stock, such directors shall be jointly and severally liable for the debts of the corporation, then existing, or incurred while they remain in office; or if such directors shall, by any official act or conduct, fraudulently induce any person to give credit to such corporation, they shall be liable in like manner to such person for any loss he may sustain thereby; but any director who voted against such dividend, or such fraudulent act or conduct, if present, or who thereafter as soon as the same came to his knowledge, filed his objections thereto, shall be exempt from such liability.

SEC. 16. Any corporation organized under this act, which does not elect directors and commence the transaction of the business for which it was formed, within one year from the time of the filing of the articles of incorporation shall thenceforth be divested of its corporate powers, and if such corporation shall, for any period of six months after the commencement of its business, neglect and cease to carry on the same, its corporate powers shall also cease.

SEC. 17. All corporations that expire by the limitation specified in their articles of incorporation, or are annulled for forfeiture or other cause by the judgment of a Court, continue to exist as bodies corporate for the period of five years thereafter, if necessary, for the purpose of prosecuting or defending actions, suits or proceedings, by or against them, settling their business, disposing of their property and dividing their capital stock, but not for the purpose of continuing their corporate business.

SEC. 18. The stockholders of any private incorporation heretofore incorporated by any special act of the Legislature, may at any time hereafter, while such corporation exists, incorporate themselves under this act, in the mode herein prescribed, for the purpose of carrying on the enterprise, business, pursuit, or occupation, for which they may have been specially incorporated; and the filing of the articles of incorporation shall be deemed a surrender of such special incorporation, but not of any vested right thereunder, and thereafter such corporation shall have the powers and privileges, and be subject to the liabilities and limitations provided by this act, and not otherwise.

SEC. 19. Any corporation organized under the provisions of this act may, at any meeting of the stockholders which is called for such purpose, by a vote of the majority of the stock of such corporation, increase or diminish its capital stock or the amount of the shares thereof, or authorize the dissolution of such corporation and the settling of its business and disposing of its property and dividing its capital stock; *provided, however*, that the capital stock of any corporation formed under this act, except corporations formed for the purpose of making and constructing a railroad, shall never exceed the sum of two million of dollars, and any corporation that shall violate this provision of this act shall forfeit its corporate rights.

SEC. 20. Any corporation formed for the purpose of navigating any stream or other water, may, by virtue of such incorporation, construct any railroad, macadamized road, plank road or clay road, or canal or bridge, necessary and convenient for the purpose of transporting freight or passengers across any portages on the line of such navigation, occasioned by any rapids or other obstructions to the navigation of such stream or other water, in like manner and with like effect as if such corporation had been specially formed for such purpose; but no corporation formed under this act or heretofore or hereafter incorporated by any special act of incorporation, passed by the Legislative Assembly of this State or otherwise, for the

purpose of navigating any stream or other water of this State, or forming the boundary thereof in whole or in part, nor any stockholder in such corporation, shall ever take or hold stock, or any interest directly or indirectly in the stock of any corporation which may be formed under this act, for the purpose of building or constructing any road in this act mentioned; nor shall any such corporation ever purchase, lease or in any way control such road or the corporate rights of such last-named corporation; *provided further*, that corporations heretofore incorporated or which may hereafter be formed under this act for the purpose of establishing and keeping a ferry across any stream or other water of this State or forming the boundary thereof, in whole or in part, shall not be deemed a corporation for the purpose of navigating such stream or water within the meaning of this act, nor shall the stockholders thereof be restrained from taking or holding stock in a corporation formed under this act for the purpose of constructing or building any road.

SEC. 21. The stockolders may, by a majority vote of the stock, change its general place of business.

SEC. 22. The directors of any corporation may file supplementary articles of incorporation, at any time when a unanimous vote of all the stock subscribed shall so determine, for the purpose of engaging in any new enterprise or business pursuit, not in violation of law, for the purpose of changing any part of the route of their road or canal, or either terminus, or both; the directors shall cause a notice to be published of the filing of such supplementary articles, setting forth the object of the same.

SCHEDULE B.

TITLE II.

Corporations, when authorized to appropriate land for corporate purposes.

SEC. 23. A corporation organized for the construction of any railroad, macadamized road, plank read, clay road, canal or bridge, shall have a right to enter upon any land between the termini thereof, for the purpose of examining, locating and surveying the line of such road or canal, or the site of such bridge, doing no unnecessary damage thereby.

SEC. 24. Such corporation may appropriate so much of said land as may be necessary for the line of such road or canal, or the site of such bridge, not exceeding sixty feet in width, besides a sufficient quantity thereof for toll-houses, workshops, materials for construction, timber excepted, a right of way over adjacent lands to enable such corporation to construct and repair its road, canal or bridge, and to make proper drains; and in the case of a railroad, to appropriate sufficient quantity of such lands, in addition to that specified in this section, for the necessary side tracks, depots and water stations, and the right to conduct water thereto by aqueduct; but no such appropriation of private property shall be made until compensation therefor be made to the owner thereof, irrespective of any increased value thereof, by reason of the proposed improvement by such corporation, in the manner hereinafter provided.

SEC. 25. Any corporation may change the grade or location of its road or canal, not departing from the general route specified in the articles of incorporation, for the purpose of avoiding annoyances to public travel or dangerous or deficient curves or grades, or unsafe or unsubstantial grounds or foundation, or for other like reasonable causes, and for the accomplishment of such change shall have the same right to enter upon, examine, survey and appropriate

the necessary lands and materials, as in the original location and construction of such road or canal.

SEC. 26. When it shall be necessary or convenient in the location of any road herein mentioned, to appropriate any part of any public roads, street or alley, or public grounds, the County Court of the county wherein such road, street, alley or public grounds may be, unless the same be within the corporate limits of a municipal corporation, is authorized to agree with the corporation constructing the road, upon the extent, terms and conditions upon which the same may be appropriated or used, and occupied by such corporation; and if such parties shall be unable to agree thereon, such corporation may appropriate so much thereof as may be necessary and convenient, in the location and construction of said road.

SEC. 27. Whenever a private corporation is authorized to appropriate any public highway or grounds, as mentioned in the last section, if the same be within the limits of any town, whether incorporated or not, such corporation shall locate their road upon such particular road, street or alley, or public grounds, within such town, as the local authorities mentioned in the last section, and having charge thereof, shall designate; but if such local authorities shall fail or refuse to make such designation within a reasonable time, when requested, such corporation may make such appropriation without reference thereto.

SEC. 28. Whenever such public highway or grounds is taken by a private corporation by agreement with the local authorities mentioned in section 26, such corporation may place such gates thereon, and charge and receive such tolls thereat, as such local authorities may consent to by such agreement and none other; but when the same is appropriated without such agreement, as provided in section 27, such corporation shall not place any gate or other obstruction upon the public highway or grounds appropriated, nor charge or receive any toll from any person passing over or along the same.

SEC. 29. Any road, other than a railroad, constructed by a corporation formed under this act, shall be cleared of standing timber for thirty feet in width of said road, and shall have a track in the centre not less than sixteen feet wide, finished and kept in good traveling condition, except where the cutting on said road is six feet or more deep on either side, in which case such track need not be more than ten feet wide, with turnouts of sixteen feet in width for every quarter of a mile of such narrow track.

SEC. 30. All streams or other waters upon the line of such roads, shall be safely and securely bridged, except where the County Court of the county wherein the line of such road may cross such streams, or other water, or if such stream or other water form the boundary between two counties, then the County Court of either of said counties may authorize the corporation to place a ferry-boat upon such stream or other water, to be kept and run for such toll as the County Court may prescribe, and in the manner required of ferries established under the general statutes in relation to ferries; or except where such County Court may authorize such corporation to connect their road with a ferry, now or hereafter established over such stream or other water under the general statute in relation to ferries.

SEC. 31. Whenever a road of any kind herein mentioned, other than a railroad, is completed, or any particular section of it, fit for public travel, the corporation shall give notice thereof, by publication in some newspaper of general circulation, along the line of such road or section, or by posting notices along the line of such road or section, or by posting notices along such line in some conspicuous places, not less than five miles apart, and thereafter such road or section thereof is a common highway, so that every person with his stock and vehicles of every description may travel thereon upon the payment of the tolls prescribed by the corporation, subject to the power of the corporation, by giving notice thereof in like manner, to suspend such right of travel upon all or any portion of

such road, for a reasonable time, to enable it to make any necessary repairs or improvements thereon.

SEC. 32. A corporation shall only collect and receive toll on its road at a gate established thereon, and such shall be plainly and specifically printed or written upon a signboard, posted at such gate, in plain view of the travel on the road; but such corporation shall not establish any gate within the limits of any town, whether incorporated or not, or within one-half mile of the limits of such town, except as specially provided in section 28; but no person traveling on foot, or going in any manner or with any property, from one part of his farm to another part, or going to or from church, funerals or elections, is liable to pay for traveling upon such roads.

SEC. 33. Any person traveling upon any road herein mentioned, who shall pass through a gate thereon, without paying the toll legally chargeably thereat, or who shall go round such gate, with the intent to avoid the payment of such toll, shall be liable to the corporation for three times the amount thereof, and any corporation which, by its agents or servants, or in any manner shall illegally collect any toll from any person traveling on such road, shall be liable to such person for three times the amount thereof.

SEC. 34. Any bridge constructed by a corporation formed under this act, when completed and fit for public travel, and notice thereof is posted in some conspicuous place on such bridge, or by publication in a newspaper, as in the case of a road, is a common highway within the meaning, and subject to the conditions specified in section 31, as to roads, and subject to the further power of the corporation to prescribe, by advertisement in some conspicuous place on such bridge, the rate of speed anyone may travel on such bridge.

SEC. 35. A corporation may collect or receive such tolls for crossing its bridge as may be plainly written or printed upon a signboard, posted in some conspicuous place on

such bridge, but no person not liable to pay toll on a road, as provided in section 32, is liable to pay toll for crossing such bridge; and any person who shall pass over such bridge without paying the toll legally chargeable thereat, or any corporation which shall illegally collect any toll from any person crossing such bridge, shall be respectively liable to each other for three times the amount of such toll as provided in section 33, in case of roads.

SEC. 36. Every corporation formed under this act for the construction of a railroad, as to such road shall be deemed common carriers, and shall have power to collect and receive such tolls or freights for transportation of persons or property thereon as it may prescribe.

SEC. 37. It shall be the duty of every incorporation organized for the construction of any macadamized road, plank road, clay road or bridge, to keep an accurate statement or account of the moneys expended by said corporation, in the construction of any such road or bridge, and keeping the same in repair, including any sums paid for lands, appropriated as necessary for said corporation, which statement or account shall be verified at the time of the annual meeting held for the election of directors, by the president of the said corporation, or one of the directors thereof, to the effect that he believes the said account to be just and correct, and a copy of such verified account shall, within ten days after such annual election, be deposited with the clerk of the county with whom the articles of incorporation are filed. Said corporation shall also keep an accurate account of the tolls received for traveling upon said road or bridge, or of other profits accruing to said corporation, which account shall be verified in like manner, and a copy thereof deposited with said county clerk within ten days after such annual election.

SEC. 38. At any time after the expiration of ten years from the time of taking tolls on any mecadamized road, plank road, clay road or bridge, it shall be lawful for the County Court of any county through which any such

road, or part thereof, shall pass, or in which such bridge may be situated, to pay to such corporation the amount of money expended by it in the construction of such road or bridge, and keeping the same in repair, and all other necessary expenses, including any sums paid for lands appropriated by such corporation, together with interest on said account, and sums of money at the rate of twenty per centum per annum, after deducting from said amount the tolls and other profits annually received by said corporation, and after the payment of the amounts expended in constructing and keeping in repair said road or bridge, and other necessary expenses incurred in and about the same, and interest thereon, less the amount received by such corporation, the said road or bridge shall become free for public travel.

SEC. 39. The foregoing section shall not be construed so as to prohibit said County Court, at any time before the expiration of said period of ten years, from purchasing said road or bridge, for any sum that may be agreed upon by said County Court and corporation.

SCHEDULE C.

LAWS OF OREGON, 1878, P. 95.

AN ACT to authorize Foreign Incorporations to do Business, and Exercise their Corporate Powers within the State of Oregon.

Be it enacted by the Legislative Assembly of the State of Oregon:

SECTION 1. That any foreign incorporation incorporated for the purpose of constructing, or constructing and operating, or for the purpose of or with the power of acquiring and operating any railway, macadamized road, plank road, clay road, canal or bridge, or for the purpose of conducting water, gas or other substance, by means of pipes laid underground, shall, on compliance with the laws of this State for the regulation of foreign corporations transacting business therein, have the same rights, powers and privileges in the exercise of the rights of eminent domain, collection of tolls and other prerogative franchises as are given by the laws of this State to corporations organized within this State, for the purpose of constructing any railway, macadamized road, plank road, clay road, canal or bridge, or for the purpose of conducting water by means of pipes laid under the surface of the ground.

SEC. 2. Nothing in this act contained shall be so construed as to give to any foreign corporation or corporations, any other or further rights, powers or privileges than may be acquired or exercised by corporations incorporated under the laws of this State; but only so as to give to foreign corporations the same rights, powers and privileges, on a compliance with the laws of this State, as may be acquired or exercised by corporations incorporated under the laws of this State.

Approved October 21, 1878.

IN THE

Supreme Court of the United States.

No. 275.—October Term 1887.

THE OREGON RAILWAY AND NAVIGATION CO.,

Plaintiff in Error,

vs.

THE OREGONIAN RAILWAY CO. LIMITED,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

BY

EDMUND ROBERTSON.

Press of Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term 1887.

THE OREGON RAILWAY AND NAVIGATION COMPANY,
Plaintiff in Error,
vs.
THE OREGONIAN RAILWAY COMPANY LIMITED,
Defendant in Error.

No. 275.

Brief of Defendant in Error, by Edmund Robertson.

The Record.

As the pleadings have become somewhat complicated by reason of repeated amendments, it may be convenient to present here a short summary of the record.

The complaint, filed 28th June, 1884, states shortly that plaintiff and defendant are corporations; that plaintiff, by indenture of lease in August, 1881, demised its railroad to defendant at a rent of £28,000 per annum; that defendant entered into possession under the lease; that the installment of rent due on 15th May, 1884, amounting to £14,000, was unpaid.

The defendant's answer, filed 19th July, 1884, admits the signature and sealing by its officers of an instrument which was by its terms an indenture of lease, and is, in fact, the instrument so described; denies that either plaintiff or defendant was authorized by law to enter into, and alleges that the State of Oregon did not authorize or con-

sent to, such leasing, and that the agreement was unauthorized and void; admits possession; alleges disavowal of lease by defendant in May, 1884, and offer to give up possession; alleges continuance of possession since that date to be in consequence of an agreement between the parties which was not to prejudice the defendant; and alleges payment for the full period of possession under the lease. (Record, pp. 4, 5.)

Defendant's amended answer, filed 30th July, 1884, admits the plaintiff to be a corporation, but denies that it was empowered by its articles of incorporation to construct or own a railroad in Oregon; alleges that defendant's president and secretary signed an instrument in writing, and affixed defendant's corporate seal thereto, which is the instrument described in the complaint; alleges that plaintiff and defendant were without power to enter into such contract, and that the State of Oregon did not consent thereto; admits possession, but pleads continuance thereof after 15th May, 1884, under agreement, as in first answer. (Record, pp. 6, 7.)

Amended complaint, filed 15th August, 1884, states that plaintiff is a corporation under the Companies Act, 1862, of Great Britain; sets out sections 6, 8, 9, 11, 14, 16, 17, and 18 of said Companies Act, 1862; sets forth the memorandum of association and articles of association of the plaintiff, and alleges that both were duly executed according to the aforesaid provisions of the Companies' Act, 1862, and that thereupon plaintiff became a duly-incorporated company, with the rights, powers, &c., therein mentioned, and has complied with the laws of Oregon and foreign laws before set forth. (Record, pp. 9–50.)

Alleges that defendant is a corporation under the general incorporation laws of Oregon, and sets forth in full its articles of incorporation.

Alleges that on the 1st August, 1881, the plaintiff being thereto duly authorized by the laws aforesaid, and its mem-

orandum and articles of association, by indenture of lease demised to the defendant a certain railroad, &c., in Oregon, and that defendant, being thereto duly authorized by law and its said articles of incorporation, and by resolution of its board of directors, did by said indenture of lease agree to pay to the plaintiff therefor the yearly rental of £28,000; alleges entry by the defendant thereupon, and continued possession of the railroad until 15th May, 1884, when defendant, pretending the invalidity of the lease, offered to restore the property, which was not then in equally good condition as when demised; that plaintiff refused to accept said surrender, but defendant agreed to continue in possession under a memorandum (set forth in full) without prejudice to any question on either side.

Alleges that defendant has refused to pay rent due 15th May, 1884.

Defendant's answer to amended complaint, filed 5th September, 1884, pleads want of knowledge or information as to whether plaintiff is a corporation, &c., as alleged, and similar pleas as to the memorandum and articles of association. (Record, pp. 51–53.)

Denies that plaintiff became vested with power to construct, operate, or lease a railroad in Oregon, and pleads want of knowledge as to whether plaintiff is an incorporated company or has the rights, &c., set forth in memorandum and articles of association.

Pleads want of knowledge as to whether plaintiff has registered office in Dundee, &c., or has complied with the State or foreign laws, or owns a railroad in the State of Oregon.

Admits that defendant is and was a corporation duly incorporated, &c., but denies that it had or has power to purchase or lease any railroad in Oregon.

Denies the alleged demise, but alleges that in August, 1881, the president and secretary of the defendant signed and sealed with its corporate seal an instrument in writing,

which was in its terms an, &c., indenture of lease, and is, in fact, the instrument described in the complaint, but denies that either plaintiff or defendant was authorized to enter into said contract, and alleges that they were without power to do so, and that the State of Oregon did not consent thereto.

Admits entry and possession until 15th May, 1884, and says that its possession since then is under the memorandum set out in complaint.

Denies that road was not in equally good condition.

Pleads payment of rent provided for in lease during the period of possession.

Defendant's amended answer (2), filed 16th September, 1884, is in the same terms as the first, except that it adds the plea that the stockholders of the defendant did not consent to said lease, nor did a majority of them do so, and states that the possession of the road after 15th May, 1884, was, at the special request of the plaintiff, &c., under the memorandum set forth in complaint. (Record, pp. 56–58.)

Demurrer to answer filed 17th September, 1884. (Record, p. 59.)

Demurrer overruled October 8, 1884, and leave given to plaintiff to file a motion to strike out the amended answer as frivolous. (Record, p. 66.)

Defendant's amended answer (3) to amended complaint filed 18th October, 1884. (Record, pp. 67–9.)

Denies that the plaintiff is a corporation.

Admits the sections of the company's acts set forth in complaint, and alleges that they are the only provisions relating to the powers of corporations, and that they do not confer upon the plaintiff any power or authority to lease its railroad.

Pleads want of knowledge, &c., as to memorandum and articles of association set out in complaint.

Denies that plaintiff is vested with power, &c., to construct, operate, or lease railroad, &c., in Oregon, and pleads

want of knowledge as to its registered office, or its compliance with State or foreign laws.

Denies that plaintiff is an incorporated company, or has the powers, &c., mentioned in memorandum and articles of association, or is entitled to transact business, or owns a railroad in Oregon.

Admits that defendant is a corporation, but denies that it has power to purchase or lease a railroad

Denies the clause, but alleges that its secretary "signed the paper and writing plaintiff as a lease;" that neither had auth this writing or any indenture on behalf of neither plaintiff nor defendant was empov such writing or any indenture of lease; t Oregon did not authorize or consent thereto, that [illegible] special or other law of said State confers such authority on either party; that the stockholders of defendant did not authorize or consent to such contract; and that the agreement is unauthorized and void.

Admits entry and possession till 15th May, 1884, but alleges possession since that date to be under the memorandum set forth in complaint. Alleges payment of rent for period of possession. Denies that road was not in good condition, &c., 1st December, 1884. Plaintiff's motion to strike out answer as frivolous denied, and defendant allowed to file a third amended answer.

Defendant's amended answer (4) to the amended complaint, filed 1st December, 1884, is in same terms as the previous answer, (No. 3,) except that the paragraph admitting that the president and secretary signed the paper relied on as a lease adds "and affixed thereto defendant's corporate seal," and that the following further separate defense is set up, viz.: (Record, pp. 72–75.)

(1) That the railroad which the defendant was authorized to construct and operate was in the eastern part of Oregon, and "did not embrace" the demised railroad, which "is

which was in its terms an, &c., indenture of lease, and is, in fact, the instrument described in the complaint, but denies that either plaintiff or defendant was authorized to enter into said contract, and alleges that they were without power to do so, and that the State of Oregon did not consent thereto.

Admits entry and possession until 15th May, 1884, and says that its possession since then is under the memorandum set out in complaint.

Denies that road was not in equally good condition.

Pleads payment of rent provided for in lease during the period of possession.

Defendant's amended answer (2), filed 16th September, 1884, is in the same terms as the first, except that it adds the plea that the stockholders of the defendant did not consent to said lease, nor did a majority of them do so, and states that the possession of the road after 15th May, 1884, was, at the special request of the plaiptiff, &c., under the memorandum set forth in complaint. (Record, pp. 56–58.)

Demurrer to answer filed 17th September, 1884. (Record, p. 59.)

Demurrer overruled October 8, 1884, and leave given to plaintiff to file a motion to strike out the amended answer as frivolous. (Record, p. 66.)

Defendant's amended answer (3) to amended complaint filed 18th October, 1884. (Record, pp. 67–9.)

Denies that the plaintiff is a corporation.

Admits the sections of the company's acts set forth in complaint, and alleges that they are the only provisions relating to the powers of corporations, and that they do not confer upon the plaintiff any power or authority to lease its railroad.

Pleads want of knowledge, &c., as to memorandum and articles of association set out in complaint.

Denies that plaintiff is vested with power, &c., to construct, operate, or lease railroad, &c., in Oregon, and pleads

want of knowledge as to its registered office, or its compliance with State or foreign laws.

Denies that plaintiff is an incorporated company, or has the powers, &c., mentioned in memorandum and articles of association, or is entitled to transact business, or owns a railroad in Oregon.

Admits that defendant is a corporation, but denies that it has power to purchase or lease a railroad in Oregon.

Denies the clause, but alleges that its president and secretary "signed the paper and writing relied upon by plaintiff as a lease;" that neither had authority to execute this writing or any indenture on behalf of defendant; that neither plaintiff nor defendant was empowered to execute such writing or any indenture of lease; that the State of Oregon did not authorize or consent thereto; that no special or other law of said State confers such authority on either party; that the stockholders of defendant did not authorize or consent to such contract; and that the agreement is unauthorized and void.

Admits entry and possession till 15th May, 1884, but alleges possession since that date to be under the memorandum set forth in complaint. Alleges payment of rent for period of possession. Denies that road was not in good condition, &c., 1st December, 1884. Plaintiff's motion to strike out answer as frivolous denied, and defendant allowed to file a third amended answer.

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(1) That the railroad which the defendant was authorized to construct and operate was in the eastern part of Oregon, and "did not embrace" the demised railroad, which "is

a wholly different road," having no connection with the road whose termini are mentioned in the articles of the O. R. and N. Co. And—

(2) That prior to the lease the whole capital of the defendant had been applied to a wholly different and independent railroad, "having no near connection with or relation to" such railroad; that the stockholders never assented thereto, and that the act of defendant's officers in seeking to bind defendant was a wholly unauthorized attempt to divert defendant's capital to a wholly new object and enterprise.

Plaintiff's demurrer, filed 5th December, 1884, demurs (1) to so much of the answer as questions the plaintiff's corporate existence, or capacity to contract, contrary to the defendant's deed of 1st August, 1881; (2) to so much of the answer as denies defendant's power to make the contract; and (3) to the new matter set up in the separate defense. (Record, p. 81.)

Plaintiff also filed on same date a motion to strike out specified portions of the answer and the residue thereof not demurred to. (Record, p. 82.)

On 18th March, 1885, the motion to strike out was allowed on the ground that the matter in answer included therein was redundant and irrelevant; and the demurrer was sustained on the ground that the remaining denials and defenses were not sufficient to bar the plaintiff of its action; and judgment was given for the amount sued for. (Record, pp. 83, 84.)

The only substantial question in this case is the validity of the lease of August 1, 1881, by which the plaintiff company devised its railroad to the defendant company. The defendant, instead of raising this issue by demurrer to the complaint, has resorted to allegations of want of power on the part both of the plaintiff and the defendant, and to these allegations the defendant has demurred.

The defendant has also sought to deny the corporate existence of the plaintiff, but it may be pointed out that in the two first of its six successive answers the corporate existence of the plaintiff was admitted; in the two next answers the plea of want of knowledge as to the plaintiff's corporate existence was substituted for this admission. It was only after a motion (filed pursuant to the opinion indicated by the Circuit Court on the 8th of October, 1884) to strike out the whole answer as frivolous that the defendant resorted to a direct denial of this purely formal allegation. In two of its six answers, then, the defendant has admitted that the plaintiff is a corporation; in two it has pleaded want of knowledge; and in two it has denied the fact.

On the pleadings in their final shape it is admitted that the alleged indenture of lease was executed on the 1st August, 1881, between the plaintiff, "The Oregonian Railway Company Limited," and the defendant, "The Oregon Railway and Navigation Company"—the latter acting through its president and secretary, who signed and sealed the lease with its corporate seal under the direction of its board of directors; that the defendant entered into possession of the railroad so demised, and paid the rent reserved in the lease down to the 15th May, 1884, when the installment now sued for became due; that the relevant provisions of the British statutes under which the plaintiff claims to be incorporated are as set forth in the complaint; and that the articles of incorporation of the defendant are as set forth in the complaint.

The demurrer sustained by the Court below raises the questions—(1) Whether the defendant is estopped to deny the corporate character and powers of the plaintiff. (2) Was the lease within the corporate powers of the defendant. (3) Is the separate answer a defense to the action.

Of these questions, the second is by far the most important, and it will be convenient to take it first.

I. Was the Lease Within the Powers of the Defendant?

Although leases and other assignments or contracts by corporations have often been challenged as being *ultra vires*, we believe no precedent is to be found for the contention set up by the defendants in this case. The invariable ground of objection has hitherto been, that the disputed contract was not within the powers, expressed or implied, conferred upon the corporation by its charter. Here it is admitted that the contract in question is covered by the express words of the defendant's articles of incorporation; and the defendant's contention, therefore, amounts to nothing less than this—that its own articles of incorporation are, so far as they relate to leasing, illegal and void.

Precisely the same considerations apply to the objection that the lease was beyond the powers of the plaintiff company. The argument is, not that the plaintiff's charter did not include the subject-matter of leasing, but that, in so far as it did include and authorize leasing, it was illegal and void. Although the defendant is estopped from denying the corporate powers of the plaintiff in this action, the Court will see that the argument establishing the validity of the lease on the part of the defendant applies equally to establish its validity on the part of the plaintiff. Both companies are incorporated by articles of incorporation under general corporation laws of essentially the same character, and the charter in each case expressly purports to contain the powers which are here denied.

The Constitution of Oregon provides (article XI, section 2) that "corporations shall be formed under general laws, but shall not be created by special laws, except for municipal purposes."

The general corporation law of Oregon, under which the defendant was incorporated, provides (Miscellaneous Laws, chapter VII, title 1) as follows:

"SECTION 1. Whenever three or more persons shall desire to incorporate themselves for the purpose of engaging in any lawful enterprise, business, pursuit, or occupation, they may do so in the manner provided in this chapter.

"SEC. 2. Such persons shall make and subscribe written articles of incorporation, &c.

"SEC. 4. The articles of incorporation shall specify—

"1. The name assumed by the corporation and by which it shall be known, and the duration of the corporation, if limited.

"2. The enterprise, business, pursuit, or occupation in which the corporation proposes to engage.

"SEC. 5. Upon the making and filing of the articles of incorporation, as herein provided, the persons subscribing the same are corporators, and authorized to carry into effect the object specified in the articles in the manner provided in this chapter, and they or their successors, associates, and assigns, by the name assumed in such articles, shall thereafter be deemed a body corporate, with power—

"1. To sue and be sued.

"2. To contract and be contracted with.

"3. To have and use a corporate seal, and the same to alter at pleasure.

"4. To purchase, possess, and dispose of such real and personal property as may be necessary and convenient to carry into effect the object of the incorporation."

Under this law the defendant company was organized with articles of incorporation, of which article III provides as follows:

"The business of the corporation shall be—

"*First.* To construct and equip the following railroad and telegraph lines" (naming five separate lines of railroad).

"*Second.* To purchase or consolidate with, or *lease* or operate and maintain, on such terms as may be agreed upon, any railroad or railroads in Oregon, Washington, Idaho, or Utah, with its or their rolling-stock, equipments, or appurtenances, and to complete the same to its authorized terminus."

Under these powers the defendant leased the plaintiff's railroad. That such a lease should be repudiated as invalid

is scarcely credible. The law of Oregon authorizes corporations for any lawful business, enterprise, pursuit, or occupation. This corporation is created under that law for the express purpose of leasing and operating railroads in Oregon. On what pretext, then, is the lease attacked? In there anything in the law of Oregon prohibiting people in general or corporations in particular from leasing things in general or from leasing railroads in particular? Absolutely nothing. On the contrary, there is, as we shall show, ample recognition of the lawfulness of such enterprises, whether on the part of individuals or of corporations.

The whole case of the defendant rests on a gross misapplication and misunderstanding of the rule laid down by this Court in the case of Railroad *v.* Thomas, 101 U. S., p. 71. There the company was created under a special act of the Legislature, which gave it power to *construct and operate*, but not *to lease;* and the Court held that a lease of the company was *ultra vires.* "The powers of corporations," says Mr. Justice Miller, "organized under legislative statutes are such, and such only, as those statutes confer. The charter of a corporation is the measure of its powers, and the enumeration of these powers implies the exclusion of all others." Had the defendant's articles been silent as to leasing, this case might have been cited as an authority against the validity of the lease, but with the articles as they are, it is an authority for the lease; and so, indeed, is every other case in the United States and England in which the contract of a corporation has been declared *ultra vires.*

The decision in Railroad *v.* Thomas is avowedly based on the case of Riche *v.* Ashbury Carriage Co. (Law Reports, 7 H. L.) in the House of Lords; and Mr. Justice Miller adopts the language used in that case. Riche *v.* Ashbury Carriage Co. again follows a long line of English cases in which companies organized under special acts have been held incompetent to make contracts not falling within their purposes as defined by such acts. But Riche

v. Ashbury Co. has a peculiar value in the present controversy, inasmuch as, unlike its predecessors, but like the present case, it concerns the power of a company incorporated, not by special act, but by articles of incorporation under a general act. The decision assumes that the memorandum of association is the equivalent of a legislative charter. Whatever is authorized thereby is valid; whatever is not so authorized is invalid. "The memorandum of association," says Lord Selborne, (p. 693,) "is under that act, (the Companies Act, 1862,) then, fundamental, and, except in certain specified particulars, their unalterable law." And Mr. Justice Miller in Railroad *v.* Thomas says: "The memorandum of association, as Lord Cairns said, stands in the place of a legislative charter." Such is the implication in all of these cases. If the disputed powers had been contained in the charter, they would have been held valid. Such is the implication, also, in the more recent cases, in which this Court has followed the decision in Railroad *v.* Thomas. In the Pennsylvania Co. *v.* St. Louis (S. C. Reporter of Jan., '86), it is stated as the just result of all the cases "that, *unless specially authorized by its charter*, or aided by some other legislative action, a railroad company cannot by lease or other contract turn over to another company, nor can any other railroad company without similar authority make a contract to receive and operate," &c. In the present case, as appears from the pleadings, each company was "*specially authorized by its charter.*" There was other legislative aid as well. (See *supra*, p. 32.) And, therefore, so far as these decisions apply at all, they prove the lease to be valid.

These are the only decisions on which the defendant pretends to rely, and they are either irrelevant, or they prove that the disputed power, being contained in the charter, is valid. The only resource of the defendant, then, is to attack the charter, and in this undertaking it does not, so far as we can find, rely upon any judicial precedent

whatever. Indeed it does not openly profess to attack its articles of incorporation. It carefully confuses the two questions: (1) Is the power contained in the articles? and (2) are the articles valid? It scarcely ventures to assert a negative in either case, but shelters itself in a formula which includes both, viz., that the defendant had no power to make this contract.

The defendant having organized itself for the purpose of leasing and operating a railroad in Oregon, a lease taken by it can only be impugned by showing that the purpose here declared is not a lawful purpose. If it is a lawful purpose, the O. R. & N. Co. is organized for that purpose, and the lease is a valid exercise of its powers. If it is not a lawful purpose, it must be shown that it is either prohibited by the general law, or that it is specially prohibited to corporations.

There is, of course, no pretense that the leasing of anything, railroad included, is prohibited by the general law.

Is there any pretense for saying that it is prohibited specially to corporations? There is absolutely no express prohibition to corporations in the law of Oregon, but, on the contrary, as will be shown, an express recognition of its lawfulness as a corporation enterprise.

The only ground yet suggested for such a conclusion is that the lease of a railroad is contrary to public policy. In this vague proposition lies the whole case of the defendant.

That a lease of a railroad without power to that intent conferred upon the company making the lease is against public policy, may be admitted on the ground that it involves an abandonment of franchise and duty. It has also been admitted that such a lease would be bad on the mere ground of *ultra vires*, if there is in reality any distinction between the two grounds.

But what has to be feared here is not that a lease without authority of the State is bad, but that a lease is in itself an unlawful purpose, business, or enterprise, because, if it

I.

The public interest is deeply involved; for, as shown in the affidavits, the road has been dilapidated and broken up, and so remains in the hands of the plaintiff in error, and is not performing its duty to the public. The defendant in error cannot take any steps to restore it without of course resuming possession and terminating the lease—the very thing the plaintiff in error is attempting to accomplish in this suit.

II.

The papers show that the franchise of the defendant in error has been made liable to forfeiture by this conduct of the plaintiff in error, which forfeiture would be the absolute destruction of all the rights of the defendant in error, and the loss of its whole undertaking. It cannot escape from this impending danger until the case is heard, determining whether the plaintiff in error is to keep its engagements and perform its public duties under the lease, or whether the road must go back into the hands of the defendant in error, which would then perform them itself. Whichever way the case is decided, therefore, the danger of the destruction of the whole undertaking of the defendant in error is averted.

III.

The papers show that there are large arrears of taxes which it was the duty of the plaintiff in error, under the

The case is briefly this: The defendant is an English corporation which built a railroad in Oregon partly by capital stock paid in and partly by money raised on a mortgage of the undertaking, and in 1881 leased its whole line to the plaintiff in error for a certain annual rent, and with clear and express stipulations that the lessee should keep the road in order, work it, pay the taxes, etc., etc., and in all things operate it for the public as the defendant should and would do. Under this lease the plaintiff in error took possession and paid rent to the spring of 1884, when it refused to pay longer, and offered to return the road to the defendant in error, then already run down and broken up by loss of bridges, etc., and the neglect of the lessee to restore or repair them.

The present suit was then commenced by the defendant in error to compel the plaintiff in error to perform its obligations or some of them. The points of the defence involved are, as it appears from the record, the arguments of counsel and the opinion of the court below, technical questions presented by the plaintiff in error for the purposes of escaping the obligations of the lease and repudiating the whole arrangement. The defences all run to the regularity and powers of the corporation of the defendant in error and the powers of the plaintiff in error to take the lease.

In support of the motion to advance, the defendant in error shows to the court special and peculiar circumstances existing;—as follows, and as stated and shown more fully in detail in the affidavits marked "A" and "B," hereto annexed and made a part of these motions:

I.

The public interest is deeply involved; for, as shown in the affidavits, the road has been dilapidated and broken up, and so remains in the hands of the plaintiff in error, and is not performing its duty to the public. The defendant in error cannot take any steps to restore it without of course resuming possession and terminating the lease—the very thing the plaintiff in error is attempting to accomplish in this suit.

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The papers show that the franchise of the defendant in error has been made liable to forfeiture by this conduct of the plaintiff in error, which forfeiture would be the absolute destruction of all the rights of the defendant in error, and the loss of its whole undertaking. It cannot escape from this impending danger until the case is heard, determining whether the plaintiff in error is to keep its engagements and perform its public duties under the lease, or whether the road must go back into the hands of the defendant in error, which would then perform them itself. Whichever way the case is decided, therefore, the danger of the destruction of the whole undertaking of the defendant in error is averted.

III.

The papers show that there are large arrears of taxes which it was the duty of the plaintiff in error, under the

lease, to provide for, and that the property is liable to and in danger of being sold for their non-payment, which sale would also accomplish the ends of the plaintiff in error by destroying the lease as well as destroying all the rights of the defendant in error. And it appears that the defendant has no means out of which to pay these taxes, for the plaintiff in error has possession of all its property and assets.

The affidavits show that there is also danger of the company of the defendant in error being wound up in England and finally dissolved under British law by reason of default of paying interest on its bonds, which payments also were to be provided for by the plaintiff in error by a sinking fund, and which the plaintiff in error refuses to do.

While it is admitted that the mere poverty of a party is not a ground for advancing a cause, it is confidently insisted that where the conduct of either party is such that the one seeking redress cannot relieve itself, not only from pecuniary loss, but from imminent danger of absolute extinction without giving up the whole subject of the pending controversy, or getting the case to a hearing, the special and pecuniary circumstances mentioned in the rule of this court do abundantly exist and require the case to be advanced.

On Motion to Affirm.

In regard to the motion to affirm, it is respectfully submitted that it is fairly within the spirit of Rule No. 6, providing for a motion to dismiss or affirm, and is not in contravention of any rule of the court. The substance of the thing is to allow a party to bring to the attention of the court vexatious and dilatory appeals and writs of error destitute of any merit or real doubt even.

We believe this to be such a case. As will be seen from the opinion of Judge Deady, printed in the record, all the questions involved are the stereotyped ones of corporation powers—all which questioned powers clearly existed by the statutes and laws of Oregon—and the one other question of the right of the lessee to deny the corporate existence of its lessor.

All of which is respectfully submitted.

"A."

In the Supreme Court of the United States.
October Term, 1885.

THE OREGON RAILWAY AND NAVIGATION COMPANY,
Plaintiff in Error,

vs.

THE OREGONIAN RAILWAY COMPANY, Limited,
Defendant in Error.

Affidavit of Edmund Robertson, Barrister-at-law, of No. 4 Essex Court Temple, London, England, in Support of Motion to Advance or Affirm.

I, Edmund Robertson, being first duly sworn, do say: I am a barrister-at-law, practising at No. 4 Essex Court Temple, London. During the last three years I have been engaged by the Oregonian Railway Company, Limited, to conduct various suits and actions on its behalf, including the above-entitled cause, and generally to represent the said company and protect its interests in the State of Oregon. I have, under this engagement, on three occasions visited Oregon for periods varying from five to nine months, and I am well acquainted with the affairs of the said Oregonian Railway Company, Limited, and with the condition of its railroad in the said State, and I say that it is of vital importance to the said the Oregonian Railway Company, Limited, defendant in error herein, to obtain a speedy determination of this cause, for the reasons following, amongst others:

1. The franchises of the Oregonian Railway Company, Limited, in Oregon are seriously endangered by the delay which must take place if this cause should not be advanced.

The Oregon Railway and Navigation Company (hereinafter called the Lessee) repudiated its lease of the Oregonian Railway Company's railroad in May, 1884, and it had previously, as it now turns out, by neglect and actual waste, reduced the leased railroad to a condition which makes it incapable of being fully or safely operated without extensive repairs.

The said leased railroad consists of two branches running parallel to the Willamette river, and known as the East and West Side Divisions. On the east side one of the bridges (on the south fork of the Santiam) was washed away about a year before the repudiation of the lease, and the Lessee has persistently neglected to rebuild it. Another bridge (over the north fork of the Santiam) was taken down by the Lessee about the same time and has never been rebuilt. The railroad between these two rivers and for several miles to the north of the North Santiam and to the south of the South Santiam, is wholly unoperated and incapable of being operated. The remaining portions of the East Side Division are operated partially and separately, and the East Side Division as a whole is so imperfectly operated as to be of little or no use to the public. On the West Side Division the road is capable of being operated over nearly its whole length, but both on the east and west side the disrepair is so great that the continued operation of the road, even in its present condition, cannot be relied on.

Notwithstanding that the Lessee's liability to make good this disrepair is independent of the validity of the Lease, the Lessee has at all times refused to do so and has forced the Lessor—the said the Oregonian Railway Company, Limited—to sue at law for damages.

Under Clause 27 of the Lease his Honor Judge Deady has appointed a Receiver to manage and operate the leased railroad, but the Lessor has no funds wherewith to make good the disrepair, even if it might properly and lawfully do so; all its property, with the exception of a small wharf in the city of Portland, having been leased to the Lessee. The Receiver would probably find it impossible to raise money for the repair of the road, even if power to do so could properly be given to him, without the assent of the Bondholders, which assent it is impossible to obtain.

The Lessee, by its acts and omissions above mentioned, has reduced the road to a condition in which it is almost useless to the public, and which will undoubtedly be aggravated by delay, and until the Supreme Court pronounces on the validity of the Lease there can be no escape from this state of things.

The Lessor conditioned with the Lessee that the latter should undertake all the duties and obligations of the

former, and in particular should operate the road as a first-class railroad, for the convenience of the public at reasonable rates.

The Lessor being unable itself to operate the road without forfeiting the Lease, and the Lessee having refused to operate or pay rent, the Lessor is in great danger of proceedings to forfeit its franchises in the State of Oregon.

In so far as it is responsible to the public for the operation of its railroad, it remains incapable of action and yet liable to proceedings. In the last session of the Oregon Legislature a bill passed the House of Representatives having for its object the forfeiture of the unoperated portions of the Lessor's railroad. The Lessor is, moreover, exposed to the evident danger and embarrassment of legal proceedings founded on the Lessee's default In short, the Lessee, after obtaining possession of all the Lessor's railroad property and binding itself to perform all the duties and obligations incumbent on the Lessor by law, has exposed the Lessor to the risk of judicial and legislative proceedings, grounded on the Lessee's failure to perform such duties and obligations. And the performance thereof will remain impossible and the risk of the plaintiff imminent until the determination of this cause by the Supreme Court.

2. The interests of the community served by the railroad are meanwhile being greatly injured. The road runs through the most fertile portions of the Willamette Valley, and its non-operation deprives many of the farmers of a market, and subjects the rest to monopolistic rates. Moreover, many of the said farmers, and many occupants of town lots near the depots of the said railroad, have been induced to take up their farms or lots and to make improvements thereon by the prospect of transportation being afforded on reasonable terms by said railroad. There can be no relief from the great public inconvenience caused by this state of things until this cause is determined by the Supreme Court.

3. The public taxes leviable on the railroad cannot be collected. In the hands of the Receiver it is doubtful whether the road can be so operated as to pay running expenses; it is so far ascertained that it cannot possibly be made to yield any surplus. Not only, therefore, is the State embarrassed in collecting its dues (the payment of

which was expressly undertaken by the Lessee in said Lease), but there is very serious danger that the authorities may be compelled to seize and sell those portions of the road that lie within their respective taxing districts.

4. The defense of the Lessee Company to the plaintiff's action for rent is not a *bona fide* defense, according to the best of my belief, but a conspiracy to defeat the rights of the Lessor by prolonged litigation. In support of this conclusion I state the following facts, viz:

(A) The main ground of defence alleged is that all railroad leases in Oregon are void without express statutory authority. Notwithstanding such alleged ground of defence, the Lessee Company was at the time of repudiating this lease, and still is, engaged in negotiations for the lease of its own railroad in Oregon to another company, without such authority.

(B) The Lessee Company has all along refused to perform even such obligations as are incumbent on it, whether the lease be valid or not; for example, to make good the disrepair during its period of occupation. It received a large sum, exceeding $80,000, from the Lessor for the performance of certain work on the leased railroad; but it refused and still refuses to perform such work or to restore the money it so received; so also it has refused to pay even the taxes due for the period in which it was admittedly in possession under the lease. In each case the refusal of the Lessee to perform such obligation has been and is a great embarrassment to the Lessor.

(C) The Lessee Company and its officers were well aware of the Lessor Company's obligations to its own creditors, of its entire dependence on the revenue derived from said lease, and of the effect which the sudden withdrawal of said revenue would be likely to have on the Lessor Company's corporate status in Oregon.

(D) The conduct of the defence on the part of the Lessee Company has been in many particulars incompatible with good faith on its part.

1st. The Lessee pleads the unauthorized action of its officers in making the Lease. By the laws of Oregon the only persons who could make the Lease on the part of the Lessee were the Lessee Company's Directors resident in Oregon. The Directors so resident are in like manner responsible for this defence. The resident Directors au-

thorizing this defence are, with one exception, the same individuals who authorized the Lease. In actual fact the resident Directors of the Lessee Company, with the one exception aforesaid, are in this defence setting up their own alleged improper action as a means of avoiding the contract.

2d. The Lessee Company, after the Circuit Court on the 8th October, 1884, expressed the opinion that this Lease was valid, resorted to pleas which could only have been intended to procure delay and embarrass the plaintiff (the Lessor). It sought to deny the Lessor's corporate existence (under the oath of its secretary), after having through the same secretary sworn first that the Lessor was a corporation, and second that the Lessee had no information on the subject, and after having through its attorney, J. C. Carter, admitted the fact in a brief submitted to the said Circuit Court.

(E) The Lessee Company has selected the one mode of trying the question of the validity of the Lease which was likely to damage the Lessor, whether the Lessee's contention should prove groundless or not. It might have taken proceedings in equity to have the Lease declared void and cancelled—paying rent until the question was decided.

(F) The management of the road under the Lease has been of a character inconsistent with good faith on the part of the Lessee Company.

The Lessee Company until the end of the year 1883 had as its president Henry Villard, and its policy appeared to be to aid another company—the Oregon and California Railroad Company. For this purpose it used the leased railroad in flagrant violation of the terms of the lease. It allowed the road to fall into disrepair, and it sacrificed its traffic (contrary to the express provisions of the Lease) by a secret contract with the said Oregon and California Railroad Company. Having virtually destroyed the leased railroad, and having after Henry Villard's retirement adopted a different policy with regard to the Oregon and California Railway Company, it suddenly repudiated the Lease and sought to throw back the road in a dismantled condition on the Lessors. The Directors legally responsible and alone legally authorized to act, (namely, the governing majority resident in Oregon,) were the same individuals, with one exception, throughout all these transac-

tions. During the last three years I have made careful inquiry into the management of the road by the Lessee, and I say that from first to last, both during and after the presidency of the said Henry Villard, the road never received fair play from the Lessee Company or its officers, was never honestly worked in the spirit or according to the letter of the Lease, and that the acts of the Lessee are consistent with only one theory, viz, that having for purposes of its own got possession of the leased railroad, it deliberately sought to destroy it as a going concern, and having accomplished that object, attempted to escape from its obligations by wrecking the Lessor Company.

EDMUND ROBERTSON.

Sworn and subscribed before me, at London, on the 26th day of August, 1885.

[SEAL.] THOMAS M. WALLER,
Consul General and ex officio Notary Public of the United States of America at London, England.

"B."

In the Supreme Court of the United States.
October Term, 1885.

THE OREGON RAILWAY AND NAVIGATION COMPANY,
Plaintiff in Error,
vs.
THE OREGONIAN RAILWAY COMPANY, Limited,
Defendant in Error.

Affidavit of Thomas Thornton, Solicitor, Dundee, Scotland, in Support of Motion to Advance or Affirm.

I, Thomas Thornton, being first duly sworn, do say: I am a duly qualified Solicitor and enrolled Law Agent, practicing as such at Dundee, Scotland. I am and have been since its incorporation in May, 1880, the Solicitor of the above-named the Oregonian Railway Company, Limited, and I am well acquainted with the affairs of the said Company.

The Oregonian Railway Company, Limited, was duly incorporated on the 4th day of May, 1880, under the Statutes of the United Kingdom of Great Britain and Ireland, known collectively as the Companies' Acts, for the purpose *inter alia* of building, operating, and leasing a railroad or railroads in Oregon. The ordinary share capital of said Company issued consists of 32,000 shares of ten pounds each. Said capital to the extent of six pounds per share was duly called up and expended on the construction of the railway, which was leased by the said the Oregonian Railway Company, Limited, to the Oregon Railway and Navigation Company, by a lease dated 1st August, 1881. The residue of £4 per share was, by the Memorandum and Articles of Association of the Oregonian Railway Company, Limited, specially reserved for the payment of moneys borrowed by the Company and interest thereon, and could only be called up by the Directors for the purpose of such payment, and is not available for the general purposes of the Company. The said Company has borrowed, under the powers contained in its Memorandum and Articles of Association, the sum of £214,700, which is secured by Bonds of like amount bearing interest at 6 per cent. per annum,

and by Mortgages over the railroad of the Company; said Mortgages entitle the Trustees of the Bondholders to foreclose and sell the railroad in the event of their interest not being paid when due, or within 90 days thereafter, or in the event of the railroad falling into disrepair.

By the law of its creation, as contained in the aforesaid Companies' Acts, any creditor of the said Company, failing to receive payment of his debt within six days after the Company is charged to pay the same, may throw the Company into liquidation and so terminate its corporate existence. The result of such liquidation in the existing circumstances of the said Company would be the entire loss of the share capital of £320,000, as aforesaid. Should such liquidation take place, or should the aforesaid Mortgage be foreclosed, the Lessee—the Oregon Railway and Navigation Company—would practically escape the obligations undertaken by it in the aforesaid Lease.

I latterly took part in the negotiations which resulted in the said Lease in 1881, and I believe that the facts hereinbefore set forth as to the constitution and indebtedness of the Oregonian Railway Company, Limited, were then and are now well known to the Lessee Company through its proper officers and agents. The said Lease contains an express covenant whereby the Lessee Company obliges itself to provide for the aforesaid indebtedness of the Oregonian Railway Company, Limited, by means of a Sinking Fund of £10,000 per annum, as therein mentioned, to be begun on the 15th May, 1884, and a complete list of the Bonds is given in Schedules annexed to the said Lease.

The refusal of the Lessee Company to pay the rent reserved in the Lease deprived the Oregonian Railway Company, Limited, of all its resources. The Oregonian Railway Company, Limited, has only been enabled to meet the expenses of this litigation by the generosity of two of its Directors, and liquidation has only been hitherto averted by great pecuniary sacrifices on the part of its Shareholders. There is no certainty whatever that the Company will be able to avoid liquidation pending the appeal unless the cause be advanced. On the contrary, there is great and imminent danger of liquidation or of foreclosure proceedings on the part of the Bondholders of the Company. Either of these events would be absolutely fatal to the Oregonian Railway Company, Limited, and would practically

enable the Lessee Company to escape from the obligations of the Lease, and they can only be averted, in my opinion, by a speedy determination of this cause.

THOS. THORNTON.

Sworn and subscribed before me, at Dundee, Scotland, on the 27th day of August, 1885.

WILLARD B. WELLS,
Consul and ex officio Notary Public of the United States of America at Dundee, Scotland.

"C."

THIS INDENTURE, made the first day of August, 1881, between the OREGONIAN RAILWAY COMPANY, Limited, of Dundee, in Scotland (hereinafter called the Lessors), of the one part, and the OREGON RAILWAY AND NAVIGATION COMPANY of Portland, in Oregon, in the United States (hereinafter called the Lessees), of the other part: Whereas the Lessors are the owners of a railroad in Oregon (hereinafter called "the existing railroad") consisting of two branches, namely, the East Branch, beginning at or near Ray's Ferry and running South to Brownsville, and extending, including sidings, to 74 miles or thereabouts, with a branch to Waldo, extending, including sidings, to 5 miles or thereabouts; and the West Branch, beginning at Ray's Ferry and running south to Monmouth, with branch to Sheridan, and extending in all, including sidings, to 55 miles or thereabouts: And whereas the Lessors are in course of extending the said branches respectively as to the East Branch from Brownsville to Coburg, 19 miles or thereabouts, including sidings, and as to the West Branch from Monmouth to Airlie, 12 miles or thereabouts, including sidings, and such extensions are hereinafter called "the proposed extensions of the railroad": And whereas the aggregate mileage of the existing railroad (including in such mileage the length of all sidings) is 134 miles or thereabouts, and the aggregate mileage of the proposed extensions of the railroad (including in such mileage the length of all sidings) will be 31 miles or thereabouts: And whereas the whole of the existing railroad has not yet been fully completed, certain machine shops and other workshops, and the stations and water-tanks, and the bridge over the North Santiam River being unbuilt or unfinished, and the track not yet laid on the greater part of the Waldo Branch and on some other parts of the road, in all about eight miles long, and the greater part of the road has not yet been ballasted, and farther requires to be raised at various points, as follows:—Near the South Santiam for one mile, to be raised three feet and for another mile to be raised one foot; near Brownsville, for two and one-half miles, to be raised one foot; and near Ray's Ferry for three quarters of a mile, to be raised three feet: And whereas the Lessors have issued shares of £10 each, 32,000 in number, to the nominal amount of

£320,000, and such shares have been paid up to the extent of £4 each on 16,000 of such shares, and to the extent of £2 each on the remaining 16,000 of such shares, and further calls may still be made by the Lessors on and in respect of said several shares or some of them: And whereas the Lessors have issued bonds called 1880 bonds, and have issued, or are about to issue, additional bonds, called 1881 bonds, and have secured and are about to secure the said several bonds issued and to be issued by mortgages made and to be made over the existing railroad and proposed extensions of the railroad and the rolling stock of the Lessors, the particulars of which bonds are specified in the second and third schedules hereto, and which are hereby mutually agreed and declared to be good, valid, and effectual: And whereas it has been agreed between the parties hereto that the Lessors shall grant and the Lessees accept a lease in the terms of these presents: Now, this Indenture witnesseth that, in consideration of the sum of £5974 paid on the execution of these presents (the receipt whereof the Lessors hereby acknowledge) and of the rent hereinafter reserved, and of the covenants and agreements by the Lessees hereinafter contained, the Lessors do hereby demise unto the Lessees, and the Lessees do hereby lease from the Lessors, all and singular the existing railroad, with the proposed extensions thereof, as hereinbefore described, with all stations, depots, sidings, turntables, pumps, tanks, yards, warehouses, machine shops, and other works and conveniences, and the right of way, thirty feet in width on each side from the middle of the track of said railroad and the extensions thereof, with all depot grounds, as hereinafter limited and specified; and the rolling stock of said railroad, as enumerated and described in the first schedule hereto, together with all tools, machinery, implements, supplies, and equipment of every description, and all franchises, rights, powers, and privileges to which the Lessors are entitled, or shall at any time hereafter become entitled, in connection with the said railroad and such proposed extensions as aforesaid: To have and to hold the same (subject to the mortgages made and intended to be made as aforesaid) unto the Lessees for the term of 96 years from the 1st day of August, 1881, yielding and paying therefor during the said term the yearly rent of £28,000 in sterling money, to be paid by equal half-yearly

payments on the 15th day of May and the 11th day of November in each year, in advance: the first payment, however, made on the execution of these presents, and the receipt whereof is hereinbefore acknowledged, being the apportioned rent reduced as hereinafter mentioned, as for the period from the 1st day of August, 1881, to the 11th day of November, 1881, and the second payment to be made on the said 11th day of November, 1881, for the half-year following, and so on half-yearly on the 15th day of May and the 11th day of November thereafter for each half-year, in advance; and the said rent to be paid free and clear of and from all taxes, charges, and assessments whatsoever now existing or hereafter to be imposed by lawful authority on the Lessors or on all or any of the demised premises, including all property and income tax of the United States or the State of Oregon, which said rent shall be paid in sterling money by the Lessees to the Lessors at the Bank of the British Linen Company in London, in England: Provided always, and it is hereby agreed and declared that the said yearly rent shall be reducible in manner following—that is to say: (a) Until the existing railroad shall be fully completed to the length, including sidings, of 134 miles, and shall be fully equipped with stations, water-tanks and pumps, so that there shall be between Ray's Ferry and Brownsville not less than ten station-houses, costing in the aggregate not less than $5000; and not less than five water-tanks and pumps, costing not less than $2500; and until the bridge over the North Santiam River shall be finished according to the contracts and specifications under which the same is now in course of construction, and until the track shall be raised at the points and in the manner hereinbefore recited as necessary, the said rent shall be reduced by a sum at the rate of £1376 yearly. (b) Until the East Branch of the existing railroad shall have been completed from Brownsville to Coburg the said rent shall be reduced by a sum at the rate of £3268 yearly. (c) Until the West Branch of the existing railroad shall be completed from Monmouth to Airlie, the said rent shall be reduced by a sum at the rate of £2064 yearly. (d) If and whenever during the term any of the bonds of the Lessors shall be paid off by means of any sinking fund established as hereinafter provided, then until new bonds of the Lessors

shall be issued in the place thereof, as provided by Clause 18 hereof, the said rent shall be reduced by a sum equal to £6 for every £100 of principal moneys secured by the bonds so paid off. (*) If on admeasurement thereof when completed it shall appear that the entire railroad, including in the mileage the length of all sidings, is less than 163 miles in extent, the said rent shall be reduced at the rate of £172 for every mile found deficient, and at the same proportionate rate for any part of a mile found deficient. AND THIS INDENTURE ALSO WITNESSETH that, in pursuance of the said agreement and for the reciprocal considerations herein appearing, the Lessors, so far as the stipulations and provisions of these presents are to be performed and observed by them, hereby covenant with the Lessees, and the Lessees, so far as the stipulations and provisions of these presents are to be performed and observed by them, hereby covenant with the Lessors in manner following (that is to say):

1. The Lessors shall, before the 31st day of December, 1881, prepare a plat or map showing the line of the existing railroad and of the proposed extensions of the railroad, and the situation or proposed situation of all depots or stations in connection therewith; and in such plat the track or intended track of such railroads, and a space of 30 feet on each side from the centre of such track, and a space not exceeding 10 acres at each of the first-class depots or stations, as specified in the first schedule hereto, if said Lessors shall own so much ground at such stations, and a space not exceeding 5 acres at each of the other depots or stations on said railroad and the extensions thereof, if said Lessors shall own so much ground at such stations, shall be distinguished by a special colour, and all the land of the Lessors not included in the spaces so distinguished shall be deemed to be surplus lands, and to be excluded from this lease, and such surplus lands may accordingly be sold, disposed of, or dealt with in such manner as the Lessors think fit; provided, however, that the Lessors shall not be entitled to any surplus lands unless and until 163 acres in the whole have been set off and platted as depot grounds on said railroad and the extensions thereof.

2. The Lessees shall, with all convenient speed, ballast the existing railroad, so far as not ballasted, and the proposed extensions, so far as they may not be ballasted, in a

proper and workmanlike manner, and so that the same shall be in a fit and proper state for public traffic, and the Lessors shall pay the Lessees therefor at the rate of $420 per mile, and for this purpose the Lessees shall have full and free ingress and egress to and from, and use of any or all the gravel pits now owned and in the possession of the Lessors.

3. The Lessors shall fully complete the existing railroad, and shall fully equip the same to the length (including sidings) of 134 miles with all necessary machine shops and other workshops (the Lessees having the right to fix the location of the same), station-houses, water-tanks and pumps, to be built according to contracts and specifications similar to those under which the like structures were built upon that part of the road between Ray's Ferry and Brownsville; shall finish the bridge over the North Santiam River according to the contracts and specifications under which the same is now in course of construction; shall raise the track at the points and in the manner hereinbefore recited as being necessary; and shall construct and complete the proposed extensions of the railroad; all of which the Lessors shall do and complete before the 1st day of January, 1882; provided always that in the event of loss or accident to vessels carrying rails or other materials, or from any other accidental or unavoidable cause, the said periods shall be enlarged to a reasonable extent. And it is hereby declared that, as regards each of the said extensions, the words "construct and complete" in this clause used mean that the Lessors shall construct and complete the same in a good and substantial manner, and place the same in efficient working order and condition fit to be opened for public traffic, with all necessary and proper sidings, stations, depots, warehouses, goods sheds, and other buildings, and all turntables, tanks, signals, telegraph lines, and other works and conveniences as shall reasonably be required for working the same in an efficient manner, and so that the said sections shall be at least as well constructed as that portion of the existing line which lies between Ray's Ferry and Brownsville, and equipped with the engines, tenders, carriages, wagons, and trucks specified and set forth in the first Schedule hereto annexed, and which shall be of as good quality as those upon the existing railroad. In case the Lessors shall fail to comply

with any of the requirements of these provisions within the date above specified, then the Lessees may proceed to do all things necessary to complete the same in a good and substantial manner, and put the same in efficient working order. And if the cost to the Lessees of such completion shall exceed the amount by which the said rent is reducible, as hereinbefore provided, then the said rent shall be further reducible by a sum equal to such excess.

4. Until the proposed extensions of the railroad shall have been constructed and completed as aforesaid, the Lessees shall from time to time, at the request of the Lessors or their contractors or agents, transport free of charge, by the ordinary trains, with reasonable expedition, over the existing railroad, and upon any steamers of the Lessees which may ply between Portland and Ray's Ferry, all workmen and materials intended to be employed in the construction and completion of such extensions or any part thereof; but so that all such materials shall be loaded and unloaded by the Lessors, their contractors, or agents.

5. The Lessees shall and will yearly, and in every year during the said term, well and truly pay or cause to be paid unto the Lessors the said yearly rent hereinbefore reserved, on the days and in the manner hereinbefore appointed for payment thereof, free and clear of and from all taxes, charges, and assessments as hereinbefore provided.

6. Each of the holders for the time being of any of the shares issued by the Lessors as aforesaid, and each of the holders for the time being of any of the bonds issued or to be issued by the Lessors as aforesaid, or which shall hereafter be issued by them pursuant to Clause 18 hereof, shall, over and beyond and irrespective of all rights and remedies and all actions competent to the Lessors in their corporate capacity, have a separate and independent cause of action against the Lessees in respect of any breach by the Lessees of the obligations imposed on them by these presents, and in respect of any such breach shall be entitled to recover from the Lessees, by way of liquidate damages, a sum equal to the amount which would have been payable to him by way of dividends or interest out of the rent in arrear.

7. The Lessees shall and will pay, satisfy, and discharge all assessments, taxes, charges, transit duties, and impositions whatsoever, that shall or may be lawfully assessed,

laid, or imposed on the said Lessors by any power or authority whatsoever during the term, or on the said demised premises, or the franchises, property, earnings, traffic, and business of the said demised premises, or arising in any way therefrom, or to which the Lessors would have been subject if this Lease had not been made, and they had remained in possession of the demised premises and operated the same.

8. The Lessees shall defend all actions of every kind that may or shall be depending against the said Lessors, or that may hereafter arise during the term, in respect of the construction, maintenance, or operation of said railroads, other than actions for compensation for right-of-way or depot grounds, as herein specified and defined, or for recovery of the possession of any such premises, and shall pay all amounts that shall or may be recovered against the said Lessors in any such actions, and shall also indemnify and save harmless the said Lessors of and from all causes of action, legal and equitable, and claims and demands that shall or may arise against them from the exercise of the powers conferred by this Lease upon the Lessees.

9. The Lessees shall at all times during the said term, at their own expense, maintain and operate the railroads and premises hereby demised as the Lessors, as the owners thereof, or otherwise, are now or may be by law entitled or bound to do, and shall keep up, maintain, and operate the same as first-class works in thorough repair, working order, and condition, and will maintain and keep the rolling stock and equipment and other things hereby demised in good order and repair, and will replace any rolling stock or equipment or other things lost, worn out, or destroyed, so as to maintain the same equal in quantity and quality to that originally demised, using the best and most suitable materials for renewals of the same, as renewals shall become from time to time necessary, so that the traffic and business of the said railroad shall be encouraged and developed, and full public accommodation given on reasonable terms.

10. The Lessees shall not alter the situation of the existing railroads, or of the proposed railroads respectively, or of any depots or stations belonging thereto, without the consent in writing of the Lessors, or, without such consent of the Lessors, provide other stations and depot grounds,

sidetracks, or cut-offs, not situated on the right-of-way or depot grounds hereby demised.

11. The Lessees shall at all times during the term keep proper and business-like accounts of the lands, buildings, rolling stock, machinery, works, and property which form the subjects of this lease, and the books containing such accounts shall, at all reasonable hours and times, be open to the inspection and examination of the Lessors, acting through their secretary or agents, or any director, or of such other person or persons as the said Lessors shall, from time to time by writing under their common seal, appoint to examine the same.

12. The Lessees shall and will at all times during the term give to the directors, agents, officers, and servants of the Lessors full and free access, egress, and regress to and from, and will permit them to enter into and remain upon the demised premises, or any part thereof, for the purpose of examining and ascertaining that the Lessees are observing and performing the obligations imposed on them by this lease.

13. If the Lessors shall fail to pay the interest on any of their bonds for the time being charged on the demised premises, and the Lessees shall be compelled to pay the same, the Lessees shall be at liberty to deduct the amount so paid, together with interest thereon at the rate of 7 per cent. per annum from the time of payment, from any subsequent rent becoming payable under these presents.

14. A sinking fund shall be established for the redemption of the 1880 bonds specified in the second schedule hereto, and for the purpose of such sinking fund, the Lessees shall, on the 15th day of May, 1884, and on the same day in each succeeding year up to and including the 15th day of May, 1895, pay to the trustees of said sinking fund, as hereinafter specified, the sum of £5500, and all moneys so paid to the said trustees, and the income thereof, shall be from time to time employed in the purchase of said bonds at the lowest price at which said trustees may be able to purchase the same, but not exceeding 110 per cent. of the par value thereof, and until so employed shall be invested and accumulated; and in case there shall be any part remaining when the 1880 bonds become due, thereupon such part of said sinking fund, and the investments and accumulations thereof for the time being, shall be con-

verted into money, and the proceeds thereof shall be applied in paying off the 1880 bonds, and the surplus, if any, after deducting therefrom all money (if any) then due from the Lessees to the Lessors upon any account whatever, shall be paid to the Lessees, but should there be any deficiency the Lessees shall pay the same to the said trustees, or to the said Lessors.

15. A sinking fund shall be established for the redemption of the 1881 bonds specified in the third schedule hereto, and for the purposes of such sinking fund the Lessees shall, on the 15th day of May, 1884, and on the same day in each succeeding year up to and including the 15th day of May, 1901, pay to the trustees of said sinking fund, as hereinafter specified, the sum of £4500, and all moneys so paid to the trustees, and the income thereof, shall be from time to time employed in the purchase of said bonds at the lowest price at which said trustees may be able to purchase the same, but not exceeding 110 per cent. of the par value thereof, and until so employed shall be invested and accumulated; and in case there shall be any part remaining when the 1881 bonds become due, thereupon such part of said sinking fund, and the investments and accumulations thereof for the time being, shall be converted into money, and the proceeds thereof shall be applied in paying off the 1881 bonds, and the surplus, if any, after deducting therefrom all moneys (if any) then due from the Lessees to the Lessors upon any account whatever, shall be paid to the Lessees, but should there be any deficiency the Lessees shall pay the same to the said trustees, or to the said Lessors.

16. The trustees of said sinking fund shall be three in number—one from time to time appointed by the Lessors, one from time to time appointed by the Lessees, and one from time to time appointed by the British Linen Company, at the call either of the said Lessors or the said Lessees, or failing said Company appointing one, then the Lessors shall appoint one in their place. The concurrence of the three trustees shall be necessary for any act, unless one of them shall be absent from Great Britain or incapable of acting, in which case the other two may act without the concurrence of the third.

17. The said Lessees may make the payments to said sinking funds respectively or any part thereof in the bonds

to be respectively redeemed by said sinking funds instead of in money, said bonds being in such case deemed equivalent to their par value in money.

18. When any of the Lessors' bonds are paid off, or provision made for paying off same at not less than 110 per cent. as aforesaid, by means of the sinking funds established pursuant to these presents, the Lessors shall, if thereunto required by the Lessees, issue to the Lessees new bonds, under the common seal of the Lessors, for securing the payment of principal moneys equal in amount to the principal moneys secured by the bonds so paid off, or provided for such purpose as aforesaid. The new bonds to be issued to the Lessees upon the 1880 bonds and the 1881 bonds, respectively, being paid off, or provided for, shall all bear even date, and be payable twenty years after date, and shall each be for securing the sum of £50 principal moneys, or any multiple thereof, and shall provide for the payment of interest at the rate of six per centum per annum, and shall all rank *pari passu* among themselves in point of charge, and shall rank in point of charge after any of the 1880 or 1881 bonds which may remain outstanding, and such new bonds shall not be charged on the uncalled capital for the time being of the Lessors, or be payable out of such capital, but shall contain an express exemption and release of the members of the Lessors' Company from any liability whatever in respect of said bonds, and, subject as aforesaid, shall be framed and secured by mortgage as nearly as may be in the same terms and manner as the 1880 and 1881 bonds respectively, with the declaration and covenant, however, like as it is hereby also specially covenanted and declared that in no event nor under any circumstances shall the holders of or creditors in such bonds, or any coupons or interest warrants issued along with or applicable thereto, or of or in the amounts contained in such bonds, coupons, or interest warrants, be they principal or interest, have any claim, action, interest or demand against the Company, except as hereinafter mentioned, or against any member of the Company, or against the uncalled capital of the Company, or any part thereof, or against any estate or asset, real or personal, of the Company, except or other than the said railroad, rolling stock, and other subjects hereby demised and the rent payable out of and for the same, and that, too, only

after all the other bonds, 1880 and 1881, as aforesaid, then remaining unpaid.

19. Any moneys which ought to be employed pursuant to Clauses 14 and 15 hereof, until so employed, may be invested in or upon any stocks, funds, or securities of the British Government, or of the Government of India, or any British Colony, or in the stock of the Bank of England, or in the stock, bonds, or debentures of any city, borough, or other municipal corporation in Great Britain, or in the debentures or debenture stock of any dividend paying railway company in Great Britain, and any such investments may from time to time, at the discretion of the trustees, be varied for others of a like nature, and no trustee shall be liable for any other than his own intromissions, and no liability shall attach to any trustee in the event of any investment turning out to be unsound or insufficient.

20. An account shall be taken of the moneys which have been expended by the Lessors, or for which they are liable, in relation to the Portland Branch Railroad (the construction whereof has been abandoned by the Lessors), and a fair valuation of the property acquired by the Lessors for the purposes of that branch (excluding, however, the so-called Levee Blocks in the City of Portland, and all other property granted by the Legislature of Oregon conditionally upon the extension of the railroad of the Lessors to Portland) shall be made, and the Lessees shall pay to the Lessors (*a*) the amount of such fair value, and (*b*) half the excess of the amount of the moneys expended as aforesaid over the amount of such fair value, but not exceeding in any case fifty thousand dollars, and upon the payment of said sums to the agents of the Lessors in Oregon, the Lessors shall convey such property to the Lessees absolutely. In the foresaid account the cost, freight, and insurance of and duty on the steel rails and fastenings, including bolts, nuts, spikes, and fish-plates already ordered for the said Portland Branch, shall not be included, but such expense, as the same may be certified by the secretary of the Lessors, shall be paid in sterling money by the Lessees to the Lessors in return for delivery of the said rails and fastenings. Provided, further, that in case the Lessees shall at any time within ten years from the date of these presents, construct a railroad over the

route of the abandoned extension to Portland of the Lessors' railroad as hereinbefore mentioned, the Lessees shall thereupon pay to the Lessors the other half of the expense of such abandoned extension.

20A. The Lessees shall pay to the Lessors the sum of £7000 in sterling money at the British Linen Company's bank in London for the two steamers belonging to the Lessors presently plying between Portland and Ray's Ferry; such payment shall be made on 1st August, 1881, but down to that date the Lessees shall have the option of receding from this article.

21. The Lessees shall indemnify William Reid, Ellis G. Hughes, and James B. Montgomery against all actions, suits, proceedings, costs, damages, claims, and demands in respect of freight receipts, and in accordance with a certain bond dated the 2d day of April, 1880, under the seals of the said William Reid, Ellis G. Hughes, and James B. Montgomery, for securing to one Joseph Gaston, but so far only as said bond relates to the freight receipts issued by the Dayton, Sheridan and Grande Ronde Railroad Company, and so that said Lessees shall be liable only to the extent of the sum of $80,000.

22. The Lessees shall pay to the Lessors yearly, and every year during the term at the same time and place as the rental herein specified, the sum of £600 sterling money, for the purpose of enabling the Lessors to keep up their corporate organization, and to pay their officers and office expenses.

23. The Lessees shall not assign or sublet the demised premises, or any part thereof, without the consent in writing, under the common seal of the Lessors, first had and obtained; but such consent shall not be withheld from the consolidation or amalgamation of the Lessee Company with any other Railroad Company, provided that such other Company be a Company regularly paying dividends out of its earnings, and shall adopt and assume all the obligations, stipulations, and provisions imposed on the Lessees by these presents.

24. In case the Lessees shall at any time during the term omit to pay the rent, or any moiety or instalment thereof, or fail to pay, keep, or perform the obligations or stipulations and provisions hereinbefore mentioned and provided for, or any of them, and shall continue in default

in the premises for the period of ninety days, it shall be lawful for the said Lessors, and they are hereby authorized and empowered, notwithstanding the appointment of any receiver and manager, pursuant to Clause 27 hereof, or otherwise, to enter into and upon the demised premises, or such as may be then subsisting in their place, and forming the subjects of this lease, and remove all persons therefrom, and from thenceforth to have, hold, possess, and enjoy the same as of their first and former estate therein, and thereupon all the estate and interest of the Lessees in and to the same shall absolutely cease and determine, as though these presents had never been made; provided always, however, and it is expressly understood and agreed, that the said rent shall in such event be apportioned from the time of the last preceding payment of any instalment thereof to the time of such entry, and provided, further, that such re-entry shall not in any manner affect any claim for damages against the Lessees resulting from any breach of any of the covenants hereinbefore contained.

25. At the end of the said term, or at the sooner determination of this lease, the said Lessees shall re-deliver and surrender up to the Lessors the said several subjects of this lease, or such of them as shall then be subsisting in their place, in as good order and condition as the same now are, but not including any rolling stock or equipment beyond the quantity specified in the schedule hereto.

26. The Lessees paying the rent hereby reserved, and performing the several stipulations and provisions hereinbefore contained, shall peaceably hold and enjoy the demised premises during the term, without any interruption by the Lessors or any persons lawfully claiming through them.

27. If the Lessees shall make default in the payment of any rent hereby secured, or in the performance or observance of any of the obligations or stipulations imposed on them by these presents, the Lessors shall be at liberty to obtain from any court of competent jurisdiction an order appointing a receiver and manager of the demised premises, with all such powers and authorities as may seem to the court best calculated to secure the performance and observance of the obligations hereby imposed on the Lessees, according to the true intent and meaning of these presents, and the consent of the Lessees to the appointment of any

such receiver and manager shall not be necessary, and the remuneration of any such receiver and manager shall be in the discretion of the court, and the Lessors (without the consent of the Lessees) may at any time apply for and obtain an order discharging any such receiver and manager: And the appointment and discharge of a receiver and manager shall be without prejudice to any subsequent appointment as and whenever the occasion shall arise.

28. The Lessors shall and will from time to time, and at all times hereafter, at the request and cost of the Lessees, make, execute, and deliver all such other and further instruments and assurances in the law for the further, better, or more perfectly assuring the premises hereby demised to the use and in manner aforesaid, according to the true intent and meaning of these presents, as by the Lessees or their Counsel learned in the law shall be reasonably devised, advised, or required.

29. In case any difference arises between the Lessors and the Lessees touching the preparation of the plat or map of the demised premises, or the extent of right-of-way and depot grounds hereby demised, or touching the exact length of the railroad hereby demised, or the completion of the extensions thereof, or the amounts to be paid by the Lessees to the Lessors for the property acquired for the abandoned extension to Portland, or as to the Lessees' share of the expenses of such extension, every such difference shall be referred to and determined by the arbitration of two Arbitrators, one to be appointed by each of the parties, under and subject to the following provisions and conditions:

1st. If either party do not, within thirty days after being thereunto requested in writing by or by the agent of the other party, appoint an Arbitrator, then both Arbitrators shall be appointed by the party by whom or by whose agent the request was made.

2d. The two Arbitrators, before entering on the business of the reference, shall by writing under their hands appoint an impartial and qualified person to be their Umpire.

3d. If the two Arbitrators do not within thirty days after their appointment appoint an Umpire, then, on the application of the parties in difference, or either of them, an Umpire may be appointed by a judge of any court of competent jurisdiction.

4th. If the two Arbitrators do not, within ninety days next after the matter in difference is referred to them, agree on their award thereon, then it shall be referred to the Umpire.

5th. The award of the two Arbitrators, or of the Umpire, if made in writing under their or his hands or hand, and ready to be delivered to the parties in difference, or such of them as desire it, within ninety days next after the matter in difference is referred to the two Arbitrators, or to the Umpire, shall be binding and conclusive on all parties interested, their successors and assigns, and all such things shall be forthwith thereafter done, omitted, or suffered as the award requires.

6th. The two Arbitrators and the Umpire respectively may, if they and he respectively think fit, make several consecutive awards, instead of one award, and every such award shall be binding and conclusive as to all matters to which it extends, and as if the matter awarded on were the whole matter referred.

7th. The two Arbitrators and the Umpire respectively shall have full power to examine the books, accounts, and papers of the Lessor Company relating to the matter in difference, and to examine the parties in difference, and their respective agents and witnesses, on oath or affirmation.

8th. The two Arbitrators and the Umpire respectively shall have full power to proceed in the absence of either or both of the parties in every case in which, after giving notice in that behalf to both parties, he or they shall so think fit to proceed.

9th. The Arbitrators and the Umpire respectively may proceed in the business of the reference in such manner as he and they respectively shall think fit, but so that they act in the reference at Portland, in Oregon, or upon the demised premises, or some part thereof, and so that, where any matters referred to him or them involves an examination, valuation, or measurement of any part of the demised premises, he or they shall make such examination, valuation, or measurement, either personally or by some duly qualified civil engineer appointed by them.

10th. The Umpire shall have full power from time to time, by writing under his hand, to extend the time within which his award is to be made, and if it be made and ready

to be delivered within the extended time, it shall be valid and effectual as if made and ready to be delivered within the ninety days.

11th. The costs of and incident to the Reference and the Arbitration and the Award respectively, shall be in the discretion of the Arbitrators and the Umpire respectively.

12th. If and so far as the award does not otherwise determine, the costs of the Arbitration and of the award shall be borne and paid by the two parties in difference in equal shares, and in other respects they shall bear their own respective costs.

13th. The submission to reference hereby made may at any time be made a rule of any court of law or equity on the application of any party or person interested, and the court may remit the matter to the Arbitrators or to the Umpire, with any directions the court thinks fit.

30. A notice, addressed to the Lessors at their office at Dundee, in Scotland, and posted as a registered letter, shall be deemed to have been duly given to the Lessors for all purposes of these presents at the time when the same would be delivered in ordinary course of post; and a notice addressed to the Lessees at their office in Portland, in the State of Oregon, and posted, shall be deemed to have been duly given to them for all purposes of these presents at the time when the same would be delivered in the ordinary course of post; and for purposes of such notice, the ordinary course of post between Oregon and the United Kingdom shall be deemed not to exceed forty days.

31. Whereas by reason of distance, lapse of time, or other accident, the dates of the actual execution of this Indenture by the various parties thereto may be subsequent to the day on which it bears date, now it is hereby expressly agreed and declared that this Indenture shall be dated the first day of August, 1881, and shall be valid and effectual as if executed on the day of the date thereof. In witness whereof the parties hereto pursuant to resolutions of their respective boards of directors duly authorizing the same, have caused these presents, executed in duplicate, to be sealed with their respective corporate seals, and the said Oregonian Railway Company, Limited, has likewise caused these presents to be signed by two of its ordinary directors and by its secretary, and the said Oregon

Railway and Navigation Company has likewise caused these presents to be signed by its president and by its assistant secretary the day and year above written.

THE OREGONIAN RAILWAY COMPANY, LIMITED,
(Signed) By THOMAS H. COX, *Director.*
(Signed) JOHN LENG, *Director.*
Attest DAVID FERGUSON, *Secretary.*

[Seal of the Oregonian Railway Company, Limited.]

In the presence of
(Signed) A. WILSON, Jr.,
Cashier to Messrs. Thomas Thornton, Son & Coy., Solicitors, Dundee, *witness.*

(Signed) JOHN SIMPSON, Jr.,
Apprentice to Thomas Thornton, Solicitor, Dundee, *witness.*

THE OREGON RAILWAY AND NAVIGATION COMPANY,
By H. VILLARD, *President.*
Attest
(Signed) TROILUS H. TYNDALE, *Assistant Secretary.*

[Seal of the Oregonian Railway and Navigation Co.]

In the presence of
(Signed) JAMES BOYCE MONTGOMERY.
(Signed) GEO. A. SAXER,
20 Nassau street, New York.

STATE OF NEW YORK,
City and County of New York, } *ss.*

Be it remembered, that on this 29th day of August, A. D. 1881, before me, Hector H. Tyndale, a commissioner of the State of Oregon, in and for the State of New York, residing in said city of New York, personally appeared Henry Villard, the president of the Oregon Railway and Navigation Company, and Troilus H. Tyndale, the assistant secretary of the same company, to me respectively personally known to be such, who being by me severally duly sworn; did depose and say, that he, said Henry Villard, resides in the city and State of New York; that he, said Troilus H. Tyndale, also resides in said city and State of New York; that he, said Henry

Villard, is the president, and he, said Troilus H. Tyndale, is the assistant secretary of said company; that they know the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed thereto by order of the Board of Directors of said company; and that they, said Henry Villard and Troilus H. Tyndale, signed their names thereto by the like order as president and assistant secretary of said company respectively; and they further acknowledged the execution of the within instrument to be their free and voluntary act and deed, and as the free and voluntary act and deed of said company for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal this 29th day of August, 1881.

[SEAL.] (Signed) HECTOR H. TYNDALE,
Commissioner for Oregon in New York.

I hereby certify that the within Lease and Schedules are in all manner and form executed and acknowledged by the Oregon Railway and Navigation Company in accordance with the laws of the United States and of Oregon regulating the execution and acknowledgment of instruments under seal by private corporations.

[SEAL.] (Signed) HECTOR H. TYNDALE,
Commissioner for Oregon in New York.

* * * * * * * *

[The Schedules of bonds attached to the Lease are omitted in the printing as unimportant.]

Notice of Motion.

To the Oregon Railway and Navigation Company, Plaintiff in Error in the foregoing entitled case:

You are hereby notified that the defendant in error in said cause will, on Monday, the seventh (7th) day of December, eighteen hundred and eighty-five (1885), or as soon thereafter as counsel can be heard, submit for the consideration of the court the before-stated motions and papers.

Respectfully yours,

A. H. Garland,
Geo. F. Edmunds,
Attorneys for Defendant in Error.

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FILED
DEC 7 1885
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

THE OREGON RAILWAY & NAVIGATION COMPANY,
Plaintiff in Error,

vs.

THE OREGONIAN RAILWAY COMPANY (LIMITED).

BRIEF OF PLAINTIFF IN ERROR UPON DEFENDANT'S MOTION TO ADVANCE THE CAUSE.

JAMES C. CARTER,
Of Counsel.

EVENING POST JOB PRINTING OFFICE—N. Y.

Supreme Court of the United States.

THE OREGON RAILWAY AND NAVIGATION COMPANY,
Plaintiff in Error,

AGST.

THE OREGONIAN RAILWAY COMPANY (Limited),
Defendant.

STATEMENT OF THE CASE.

The plaintiff in error is a corporate body organized under a general statute of Oregon. The defendant is a British corporation, organized under what is known as the "Companies Act" of 1862.

On the 1st of August, 1881, the defendant assumed by an indenture of that date to demise to the plaintiff in error a railroad theretofore operated by the defendant in the State of Oregon, for the term of ninety-six years. This indenture was in form executed by both the parties to it, and it contained, among other things, a covenant by the lessee to pay a yearly rental of £28,000 in equal half yearly payments of £14,000, *in advance*.

One of such half yearly payments became due on the 15th of May, 1884, and the lessee-company having refused

to pay it, this action was brought to enforce such payment.

The action was in substance like an old-fashioned suit in covenant (see Original Complaint, p. 1). The defense designed to be interposed was that the indenture of lease was absolutely void for the want of corporate power on the part of the lessor-company to make such a lease, as well as a like want of power on the part of the lessee-company to accept it, and a want of power on the part of the Board of *Directors* of the latter company to accept such a lease, even if the company itself possessed the corporate power to accept it. An answer was interposed sufficient to enable this defense to be made (see Original Answer, p. 4).

Subsequently, and before the final argument upon which the judgment now before this Court upon the writ of error was rendered, it appears that divers amendments were made of the pleadings, and motions heard in respect thereto. It does not seem needful to take special notice of any of these matters, inasmuch as the pleadings on each side were apparently in the condition in which the respective parties desired them to be at the time of the final argument on the demurrer. The complaint was amended so as to set forth the laws and the proceedings under which the defendant-in-error was organized as a corporate body. (Amended Complt., p. 9, *et seq.*) It also set forth the articles of association, original and supplementary, by virtue of which the plaintiff in error was organized.

The answer as finally amended, among other things, put in issue the allegations of the complaint that the plaintiff (below) was a corporate body, and also put in issue the averment of the execution of the memorandum of association under the "Companies Act," and it set up two pieces of affirmative matter: First, that the leased road was not a road mentioned or described in the articles of association of the lessee-company, and was not a road which that company was authorized by its articles to construct or operate, but was remote from and had no near relation to or connection with the roads which said company was authorized by its articles to construct or oper-

ate, ~~but was remote from and had no near relation to or connection with the roads which said company was authorised by its articles to construct and operate~~ (p. 74). Second, that prior to the making of the alleged indenture of lease, the whole capital of the lessee-company had been invested in an enterprise entirely distinct from the leased road, and that the acceptance of such lease by the directors of the lessee-company was an unauthorized *diversion* of the existing capital of that company to a *new enterprise* (p. 9).

To parts of this amended answer the plaintiff below demurred (p. 81), and other parts of it he moved to strike out; some as irrelevant and frivolous, and others as being both *sham* and frivolous (p. 82). The Court granted the motion and sustained the demurrer, and rendered judgment for the amount claimed in the complaint (p. 83).

Some criticism might, perhaps, be made upon technical grounds, concerning the mode in which the defendant's answer was dealt with; but upon the present motion, the counsel for the plaintiff in error choose not to indulge in it for the reason that if their view of the substantial rights of the plaintiff is correct, the judgment below must be reversed and judgment ordered for the defendant below. If any of the matters stricken from the answer of the defendant below were relevant and material, the order striking them out infected the final judgment with error, and the error is disclosed by the record. The questions, therefore, are precisely the same as if no such dealing had been had with the answer, and the judgment sustaining the demurrer had been rendered on the pleadings as they came from the hands of the parties.

A motion is now made by the defendant in error to advance the cause, coupled with a motion to affirm the judgment on the alleged ground that the record discloses no substantial question, and that the writ of error has been sued out for delay.

I.

Both these motions should be rejected *in limine*, and without examination of the grounds upon which they are

made, for the reason that they are improperly united. If either is allowed to stand for consideration, it can be the motion to advance only, and this brief, therefore, will be confined to that motion.

II.

Had this motion been made only upon such grounds of public inconvenience and the pecuniary distress of the defendant in error ~~which~~ are suggested by the affidavits, it would probably have been left unopposed by the plaintiff in error. His consent even might have been added, though such consent would probably have been unavailing, inasmuch as the Court does not, in view of the rights of other litigants, pay much regard to consents to advance causes. But the motion has been placed upon other grounds, which contain such ill-founded and mischievous imputations as to compel us to distinctly oppose it.

III.

A motion to advance cannot be supported by *ex parte* affidavits inculpating the motives of the adverse party. This Court does not tolerate the mischievous practice of regulating the order in which it will hear causes by any opinion concerning the conduct and motives of the litigants gathered from such imperfect sources as the *ex parte* and conflicting statements of rival affidavits. Such a practice would impose an intolerable burden on the Court and parties, and be productive of no benefit.

Amory *v.* Amory, 91 U. S., 356.

IV.

But inculpating affidavits, though powerless for any useful purpose, may have a tendency to create a prejudice before the argument upon the merits is reached.

Such may even be the design of them; and the plaintiffs in error have therefore thought it necessary, at the expense of considerable trouble, to expose by controverting affidavits the want of candor and the error with which the affidavits of the moving party are replete. It is believed that this has been effectually done.

V.

The grounds, good, bad, or indifferent, for the motion to advance, which the moving party seeks to suggest by his affidavits, appear to be these:

1. The inability of the lessor-company to operate the road during the litigation, and the consequent danger of a forfeiture of its franchises, and an extinction of its own capital stock, by an enforced liquidation at the instance of creditors.

2. The alleged public inconvenience, if there should be a failure to operate the road.

3. That the defense by the lessee-company against the action for rent is not *bona fide*, but in pursuance of "a conspiracy" (p. 9), and Mr. Edmund Robertson, who makes the principal affidavit, is inclined to date the "conspiracy" so far back as to include the making of the lease in 1881; his view being that the lessee-company first sought to get possession of the road through the instrumentality of the lease "*for their own purposes,*" whatever that phrase may mean, in order to first ruin it, and then to repudiate the lease (p. 11)!

VI.

There is no substance in the first of these alleged grounds. There is an intimation that the lessor-company would take up this road and run it, except for the peril of being deemed to have accepted a surrender of the lease.

This is an uncandid pretense. There has been no time at which the lessee-company would not have promptly relieved them from such a danger by a suitable stipulation, had it been asked for. It never was asked for.

But a Receiver nominated by the lessor-company is in possession of the road and operating it to a certain extent. Surely no right would be imperilled by advancing to him the necessary funds.

The notion of any real danger to the franchises from the Legislature of Oregon has no foundation.

As to the alleged danger to the lessor-company of an extinction of its own capital stock, the importance of the suggestion seems to depend upon whether the enterprise of operating this railroad can be made to be a paying one. If not, it must, in any event, unless this lease be maintained, eventually collapse. It seems to be a fair inference, even from the affidavits of the moving parties, that this road cannot be operated and made to pay even its running expenses.

VII.

In respect to the allegation that public inconvenience will follow from any cessation of the operation of the road, it is enough to say, that if the enterprise is really an abortive one, as appears to be the case, there can be no public interest in keeping it up. It never can be to the true interest of the public to carry on such an enterprise at a loss.

VIII.

In respect to the assertions of "conspiracy" and want of *bona fide* defense, we have to say that it would seem not unreasonable that a party making such grave charges as these should give some evidence tending to show the existence of such a conspiracy; should name the parties to it, or at least some of them; should supply a motive tending

to make the existence of such a conspiracy in some degree probable; and should point out some overt act in execution of it. All there is of uncontradicted fact in the moving affidavits seems to be that the lessee-company, by its directors, took a lease of the road, and subsequently failed and refused to perform its covenants. Whatever enormity there may be in such conduct rests upon the assumption, constantly made throughout this affidavit by Mr. Robertson, that these covenants possessed some legal validity, which happens to be the precise point in dispute.

The controverting affidavits of the plaintiffs in error fully repel these charges. There are, however, some statements in the affidavit of Mr. Robertson designed to support the notion of conspiracy and want of good faith which may be particularly noticed:

1. The intimation is thrown out by him (page 9) that the lessee-company has no faith in the defense based upon the alleged want of corporate power to make and take leases, because it has, since this suit arose, engaged in negotiations for the leasing of its own road. This is a reference very unfortunate for the maker of it. It is true that the lessee-company has engaged in negotiations for the placing of its business under the control of two other companies, but when the parties were sufficiently agreed as to terms to allow a submission of the proposed arrangement to counsel for an opinion, that submission was made, and the advice was given that the proposed arrangement would be utterly invalid because it amounted to a lease of the road. Upon receiving that advice the negotiations, so far as they had in view anything in the nature of a lease, were promptly abandoned; and so far as they have since been continued, relate only to the making of some traffic arrangements to which the objection of want of corporate power cannot arise.

2. The lessor asserts a failure by the lessee to pay obligations assumed by it independently of the alleged lease. All these assertions are fully met by denials.

3. The circumstance is pointed out (page 9) that a majority of the directors of the lessee-company at the present time were directors of the company at the time of the execution of the lease. But, surely, it is no unusual thing for the directors of corporate bodies to enter into arrangements which, upon investigation, turn out to be legally invalid.

In such bodies there is frequently such confidence in one man that his influence is controlling. Mr. Robertson himself says (p. 10) that "the lessee-company, until the end of the year 1883, had as its president Henry Villard, and its policy appeared to be to aid another company, the Oregon and California Railroad Company." Herein is found the explanation of this extraordinary lease, which imposes upon the lessee-company for 96 years a road which can with difficulty, if at all, pay its running expenses, with an obligation to pay an annual rent of £28,000, and to assume a heavy debt besides. It was a great advantage to the Oregon and California Railroad Company, in which Mr. Villard held a large interest. It will not be a matter difficult to understand that the directors of the Oregon Railway and Navigation Company eventually lost faith in the fidelity of their principal officer, and were thus led to scrutinize more closely those measures brought about by him in which they had participated. It may be a disagreeable duty for directors to disavow their own acts, when advised that such acts are legally invalid, but it is none the less a duty.

4. The moving party alludes (p. 10) even to the circumstance that the lessee-company in answering the complaint in the court below exercised its right of putting in issue the allegation in the complaint of the corporate existence of the plaintiff in the court below, notwithstanding, as is alleged, the fact of such corporate existence had been admitted by its attorney (p. 10). This statement is not strictly accurate. The counsel making such admission was not the attorney of the company, nor did he have charge of the litigation in

the court below. And the alleged admission was coupled with the statement that the question of the corporate existence of the lessor-company was a doubtful matter, upon which different opinions might be entertained—a fact the affidavit has not the candor to state.

5. The moving party regards it (p. 10) as another proof of bad faith that the lessee-company has selected, as its mode of testing the validity of the lease, a refusal to pay the rent. Mr. Robertson insists that the lessee company, instead of awaiting an action at law, should have itself filed a bill in equity to cancel the lease, and meantime have continued to pay the rent. Even "a barrister at law" should know that courts of equity are not easily induced to entertain bills for the cancellation of instruments where the party complaining has a good defense against them at law. That an officer of a corporate body paying out its moneys under a contract which it is distinctly advised is invalid, incurs the penalty of personal liability, is a matter familiar to most laymen.

6. There is an assertion in Mr. Robertson's affidavit (p. 9), that the lessee-company received a sum of $80,000 from the lessor-company, to be applied toward the performance of certain work on the leased road, and that it has refused to perform the work. This assertion is distinctly denied by the opposing affidavit of J. C. H. Prescott. The fact is, as stated in the affidavits of Mr. Prescott and C. J. Smith, that the lessee company has expended upon the permanent improvement of the leased road many thousands of dollars in addition to the sum of $80,000 referred to by Mr. Robertson, which it was not obliged to expend by any obligation inside or outside of the lease.

7. The assertion is made in the affidavit of Mr. Robertson, that some branches of the leased road were suffered to fall into disrepair, and perhaps, disuse, prior to the refusal to pay the rent. The precise

quantum of truth in this statement is shown in the opposing affidavit of Mr. Prescott; and as no complaint appears to have been made by the lessor-company prior to the bringing of this action, concerning any such conduct on the part of the lessee-company, it may fairly be presumed that any such disuse of the road was a measure expedient to be adopted by any party having the obligation to maintain it. Any conduct on the part of the lessee which, at the time, passed without criticism or objection on the part of the lessor cannot be made now to wear any very heinous aspect.

8. The assertion or intimation is made by the affidavit of Mr. Thomas Thornton, that it will be a result of the extinguishment or liquidation of the Oregonian Company (Limited)—which he says there is danger of—that the Oregon Railway and Navigation Company will practically escape all its obligations under the lease in question. This assertion the undersigned fail to comprehend. This leased road has, we fully believe, no value whatever; but if the lease were to be held valid, it is an asset of the Oregonian Company of exceedingly great value, for the lessee is of complete pecuniary responsibility. It cannot be the effect of any liquidation of the Oregonian Company that its assets will be destroyed. They may be transferred to creditors, but it may be regarded as certain that the result of any such transfer will not be to relieve the lessee-company from any of its obligations under this lease, should it be eventually determined that the lease possesses any validity.

IX.

The affidavits submitted by the plaintiffs in error refute the unfounded statements of the defendant's affidavit, and repel all imputations of bad faith on the part of the lessee-company. They make it clear that upon the retirement

of Mr. Villard from the presidency of the company, its affairs were found in much embarrassment and confusion. This lease was found to be so grievous a burden, as to excite inquiry as to the circumstances under which it was executed. The conclusion was that it never would have been executed, except for the controlling influence of Mr. Villard, and that in bringing it about he was moved by considerations other than the welfare of the lessee-company. The opinions of counsel were sought, and these unanimously declared the legal invalidity of the lease. The action which the lessee-company was thereupon advised to take, and did take, was the invariable course pursued in such cases; and that was to simply refuse to perform the pretended covenants, and to await an action at law in which the invalidity could be asserted.

Such action would indeed necessarily subject the lessor-company to much inconvenience, and in consequence of that the president of the lessee-company undertook to go the verge of his authority, and ran the hazard of personal liability by signing a paper to the effect that he would do all in his power to induce the lessee-company to continue the operation of the road for six months, in order to give the lessor company an opportunity for meeting the emergency in such manner as might seem to them most fit, and the road was so operated. No difficulty or embarrassment would have arisen if the lessor-company had made its arrangements, in the course of that six months, to take possession of their road and operate it. It is now intimated in their affidavits that they could not have adopted such a course without running the hazard of a charge that they had accepted a surrendered lease. This is a wholly uncandid pretense. An agreement between the two companies that such operation by the lessor company should not work any disadvantage to their rights under the lease, as they might be eventually determined, would have been completely effectual. It would have been promptly given by the lessee-company had it been asked for. The request was never made.

James C. C
of Counsel for C

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

THE OREGON RAILWAY AND NAVIGATION COMPANY,
Plaintiff in Error,

vs.

THE OREGONIAN RAILWAY COMPANY (LIMITED),
Defendant in Error.

AFFIDAVIT OF C. H. PRESCOTT, MANAGER OF THE OREGON RAILWAY AND NAVIGATION COMPANY, PLAINTIFF IN ERROR.

I, C. H. PRESCOTT, being first duly sworn, do say: That I am the manager of the Oregon Railway and Navigation Company, plaintiff in error, and am, and at all times have been, well acquainted with the relations of that company to the railroad and property mentioned in the affidavit of Mr. Edmund Robertson, filed herein; I was well acquainted with the condition of said road at the time it was taken possession of by the plaintiff in error, under the pretended contract of lease mentioned in said affidavit (hereinafter referred to as the "lease"), and at the time the same was surrendered to the custody of the Receiver, as hereinafter stated.

It is not true that the franchises of the defendant in error are endangered by the delay that must ensue if this cause is not advanced; such franchises are in no danger whatever from any cause.

It is not true that the plaintiff in error has at any time

by neglect or waste, or other means, injured said road, or made it incapable of being safely operated; said company has not neglected said road or committed any waste in respect thereto, or by any act made repairs thereon necessary; and I further say that with the exception of the two bridges mentioned in said affidavit, said road is in all respects in as good repair, or so was when the plaintiff in error delivered it to the Receiver, as it was when said plaintiff received it.

As to the statement that one of said bridges was taken down by the plaintiff in error, the facts are as follows: one span of said bridge had been entirely washed away by high water; the piers supporting the bridge had become undermined from the same cause, and the entire structure rendered wholly unsafe and useless; the plan of said bridges was faulty, and as designed and constructed, they were wholly inadequate to the requirements of the road; the remaining portions of the bridge, so partially washed away, were carefully taken down by the plaintiff in error, and preserved; this was done solely to prevent further loss in the washing away of said materials, and because it was not practicable to repair said bridge.

It is true that the House of Representatives of the Oregon Legislature did, in January, 1885, pass a bill for the forfeiture of railroads, upon failure to operate such roads for the period of six months; such bill applied to all corporations, whether domestic or foreign; it was defeated upon a vote taken in the Senate; a special session of the Oregon Legislature, at which a large amount of general legislation has been had, has just ended; no measure looking to a forfeiture of any of the franchises of the defendant in error, was passed by said body, nor was any measure having or intended to have that effect suggested therein; there was no suggestion of judicial proceeding for such forfeiture, except such as has been made by the attorneys of such defendant, for the purpose of influencing judicial action in its behalf.

I further say that all the taxes referred to in the affidavit of Mr. Edmund Robertson have been paid by the plaintiff in error, excepting about the sum of four dollars due in Lane County, which it is willing to pay; that such taxes

have been paid from time to time, the last payment having been made about a month since, and prior to any knowledge on the part of the plaintiff in error that an attempt would be made to advance this cause. The defense in this case is not, as stated in the affidavit of Mr. Edmund Robertson, a conspiracy to defeat the rights of the defendant in error; but it is made in good faith to protect the rights of the stockholders of the plaintiff in error. Said lease is in fraud of their rights. It was made solely in the interest of the Oregon and California Railroad Company. Its object was to relieve said last-named company from the competition which previously existed between its lines and those of the defendant in error, and to relieve said Oregon and California Company from the "danger of the construction of a line down the Willamette Valley into the City of Portland, parallel to its own two lines, on the right and left bank of the river," which construction the defendant in error had already commenced. The lines pretended to be leased have no near connection with the lines of transportation which the plaintiff in error is organized to construct and operate. Its capital stock was subscribed solely with a view to those lines, the termini of which are specified in its articles of incorporation.

And I further say, as to the statement contained in said affidavit made to show bad faith on the part of the plaintiff in error, that it is engaged in negotiating a lease of its own lines; that it has not entered into any lease of its lines; that its lack of power to do so has prevented such action on its part. It has not engaged in negotiating any lease at any time of its lines, except upon the condition that there should be such legislative action as would authorize such contract.

It is not true that the plaintiff in error used the said road in violation of the terms of the pretended lease, or that it allowed such road to fall into disrepair, or in any way sacrificed its traffic, or made any secret agreement with the Oregon and California Railroad Company. The $80,000 mentioned in the affidavit of Mr. Edmund Robertson, as having been received by the plaintiff in error for the performance of work on the said road, was all expended in good faith theron as intended and agreed; and the fur-

ther sum of $29,216.46 from its own funds has been in like manner employed and expended by the plaintiff in error. In addition to these expenditures it has expended about $44,531 in providing warehouses along the line of said road for the storage of freight and the accommodation of its business.

I further say that the directors of the plaintiff in error did not authorize the pretended lease, nor was the same ever ratified by its stockholders. Its directors at the time consisted of eleven members, four of whom at a special meeting pretended to pass a resolution authorizing said lease. No notice was given of the object of said special meeting to the absent members of said board. There were only said four members present at said meeting. In pursuance of said resolution, and not otherwise, Henry Villard, the president of said plaintiff in error, signed said lease as the president of the plaintiff in error. Said Villard was at the time the president of the said Oregon and California Railroad Company, and the effect of said lease was to benefit the said company at the expense of the plaintiff in error. I append to this affidavit an extract from the report of said Villard, as president of the Oregon and California Railroad Company, to the stockholders of said company, for the year 1881, to which reference is made by me to show the effect of said lease as to the said last-named company. And I further say that it was never the policy of the plaintiff in error to aid the Oregon and California Railroad Company. I believe such to have been the policy of said Villard, and I believe such policy on his part was due to his position as the president of that company, and to his relations with the holders of its stock and bonds in Germany, and that these facts were well known to the defendant in error at the time of the pretended execution of said lease; that it knew Mr. Villard's interest in the Oregon and California Company, and his relations thereto, and his purpose to aid the road of that company, and to advance the interests of its owners and creditors at the expense of the plaintiff in error, and that it availed itself of such knowledge to urge said contract of lease. The defendant in error well knew at the time that the plaintiff in error would receive no consideration or ad-

vantage for the obligations imposed upon it by the terms of said lease.

It is not true that the plaintiff in error at any time resorted to pleas in its defense herein, which were intended for delay to embarass the defendant in error.

It is not true that the management of the road pretended to have been leased while in the hands of the plaintiff in error, has been of a character inconsistent with good faith, or that there has ever been any intention on its part to wreck, destroy or injure the said road. The plaintiff in error, during the time said road was in its possession, expended for construction and betterments the sum of $116,411.16, and during the same time it expended for warehouses along said road the further sum of $44,513.64. It kept said road in complete repair, except as to the said bridges, and honestly worked the same. No complaint was at any time made by the defendant in error, as to the conduct of the plaintiff in orror in the management of said road until after the latter had refused to be longer bound by the said pretended lease.

The plaintiff in error fully paid the rental provided for in said pretended lease up to the 15th day of May, 1884. Prior to that date it informed defendant in error of its determination to surrender said property, and to no longer be bound by the said lease, so far as the same remained unexecuted. That thereupon the defendant in error represented to the plaintiff in error that it would suffer great loss and embarrassment if the operation of said road should be discontinued, and requested said plaintff to continue to operate said road for the further period of six months from said May 15th. The plaintiff in error thereupon consented to so operate said road. In pursuance of such request and promise the said companies, the plaintiff in error, by its President, T. Jefferson Coolidge, and the defendant in error, by its attorney in fact, Mr. Edmund Robertson, on the 15th day of May, 1884, entered into an agreement, whereby it was agreed that the plaintiff in error would in effect continue the operation of said road for the further period of six months, to prevent losses and embarrassments that might otherwise result. A copy of said agreement is attached to this affidavit. I

refer to it as showing, notwithstanding the statements in the affidavit of Mr. Edmund Robertson to the contrary, the good faith of the plaintiff in error and its disposition not to injure, dismantle, wreck or destroy said property.

In pursuance of such agreement the plaintiff in error did continue to maintain and operate said road until the 5th day of November, 1884, when the defendant in error brought its suit in equity in the Circuit Court of the United States for the District of Oregon, against the plaintiff in error, to enforce a specific performance of the said contract of lease. Upon the filing of said bill an order was issued on application of said defendant in errror, enjoining the plaintiff in error from ceasing to operate said road until the further order of the Court in that respect made. Thereafter, and on the day of April, upon the motion of the said defendant in error, a Receiver was appointed to take charge of and operate said road during the pendency of said suit. At the suggestion of the defendant in error one Chas N. Scott was appointed as such Receiver, who thereupon duly qualified and entered into the possession of said property, and operated said road, and continues to do so at the present time. Thereafter, and on the day of May, 1885, a demurrer to the bill of complaint in said suit was sustained, and said bill was dismissed by the Court, except for the purpose of retaining said Receiver.

The plaintiff in error has not tried to avoid responsibility under said lease for the time it remained in possession thereunder. It does not desire to retain any advantage therefrom, nor prejudice the defendant in error in any of its rights or interests by any act or thing done in pursuance of said lease. It offered to restore said property in as good repair and condition in all respects as when it received the same, which offer was refused.

I further say that thirty miles of the said railroad was acquired by the defendant in error from a corporation known as the Willamette Valley Railway Company, which company constructed said road and conveyed the same to the Oregon Railway Company (Limited) a corporation organized by the promoters of the defendant in error, by which it was conveyed to the Oregonian Railway Com-

pany (Limited) the defendant in error; that said Willamette Valley Railroad Company and said Oregon Railway Company (Limited) are corporations organized and existing under the laws of the State of Oregon; that on the 10th day of September, 1885, a suit in equity was begun in the Circuit Court of the State of Oregon for the County of Yamhill, by B. B. Branson and others against the Willamette Valley Railway Company, The Oregon Railway Company (Limited) The Oregonian Railway Company (Limited) defendant in error, and the Oregon Railway and Navigation Company, plaintiff in error, to cancel and declare void the conveyances by which the said thirty miles of railroad was conveyed to the Oregon Railway Company (Limited) and by which the same was conveyed from the latter company to the defendant in error, and to decree the lease in question, so far as it relates to said thirty miles of road, void and of no effect; that an accounting and a decree against the plaintiff in error for rents and profits found due is also prayed for in said suit. Said suit having been removed on petition to the Circuit Court of the United States for the District of Oregon, is now pending in that Court on a motion to remand to the State Court for the County of Yamhill. I am advised by the attorneys of the plaintiff in error in this State that said State Court has jurisdiction to determine said suit, and that if the matters stated in said bill are true the plaintiffs therein will be entitled to relief. I believe it to be the fact that the motion to advance this cause is made because of the pendency of said suit, and to anticipate any decision therein adverse to said defendant in error. The said defendant well knew when it begun this action that it would require about three years in which to reach a judgment in the Supreme Court of the United States, and the fact was so stated in a report made by the said Edmund Robertson at the time to the directors of his company in England; said directors were thereby advised to make provision for the requirements of their company with a view to such delay, notwithstanding the fact that this action might have been brought, if said directors had so elected, in a Court of the State of Oregon, and prosecuted

to a final judgment in the Supreme Court of the State at the last March term thereof.

C. H. PRESCOTT.

Subscribed and sworn to before me, this 26th day of November, A. D., 1885,

[SEAL.] GEO. H. DURHAM.
Notary Public for Oregon.

EXHIBIT "A."

Extract from the report of Henry Villard, President of the Oregon and California Railroad Company; to the stockholders of said company for the year 1881, being pages 10 and 11 of said report:

"Several causes contributed to this great improvement "in the earnings of the company in the year 1881. In "the first place, owing to the scarcity of ocean tonnage on "the entire Pacific coast for the export of grain during "1880, a large portion of the wheat crop of that season "remained in the country until the early part of 1881, "thus adding to the companies' transportation considera- "ble tonnage that, under ordinary circumstances, would "have been carried during the preceding season.

"Still, as there was a partial failure of the wheat crop "in 1880, the gain from this source was not very large. "The harvest of 1881, however, was very satisfactory, "and produced the greater portion of the increase in the "volume of traffic over the companies' lines. Coupled "with this increase of tonnage, there came the restoration "of rates, upon my return to the management of the "company, in pursuance of the action of the general "meeting of the bondholders, at Frankfort-on-the-Main, "on May 5, 1881. In other words, the termination of the "hurtful competition which existed previously between "the lines or this company, the steamboats running on "the Willamette River, and the narrow-gauge lines "owned by the Oregonian Railway Company (Limited), of

"Scotland, enabled the company to charge much better "rates on grain than it had received during the year "1880.

"The competition by water was ended by the friendly "relations now permanently established, it is hoped, "between this company and the Oregon Railway and "Navigation Company, through the personal union, so to "speak, of common management, represented by myself; "and that by land through the lease, by the last mentioned "company, of the Oregonian Company's system. This "lease not only relieved this company from the great "danger of the construction of a line down the Willamette "Valley into the City of Portland, parallel to its own two "lines on the right and left bank of the river, which con- "struction the other company had already commenced, "but also resulted in direct benefit to this company, from "a traffic arrangement between it and the lessee, under "which the entire upper Willamette traffic tributary to "the narrow gauge lines now reaches Portland by this "company's lines. It is not too much to say that but for "the higher rates on the increased tonnage, together with "the income derived from the business of the narrow- "gauge lines, the net revenue for 1881 would not have "much exceeded that of the previous year."

EXHIBIT "B."

MEMORANDUM.

The Oregon Railway and Navigation Company having asserted the legal invalidity of the lease executed to that company by the Oregonian Railway Company (Limited), dated August, 1881, and disavowed and disclaimed any obligation thereunder, and having offered to restore and tender to the company last mentioned the property purporting to be demised by said lease, and Edmund Robertson, representing the said Oregonian Company, having requested Mr. T. Jefferson Coolidge, President of the said Oregon Railway and Navigation Company, to continue the

operation of the railroad, purporting to be demised by said lease, for the purpose of preventing embarassments and losses which might result from suddenly discontinuing the operation of the said railroad, Mr. Coolidge has expressed his willingness to use his efforts to procure the operation of said road to be continued for a period of six months, from the present time, so far as the same may be accomplished without serious loss to the O. R. and N. Co.; but it is understood that he incurs hereby no legal obligation, either personally, or on behalf of said company. And it is also understood, that no act by him or by said O. R. and N. Co. in so continuing the operation of said road, shall in any manner prejudice or work any disadvantage to said O. R. and N. Co. in the position taken by said company as aforesaid, or in any position it may hereafter take in respect to said lease in any suit, action or proceeding, or otherwise.

It is further expressly understood that the said Edmund Robertson, on behalf of the Oregonian Railway Company, makes no admission that the said lease is other than valid and binding in all particulars, and that this paper shall in no way prejudice the rights of the Oregonian Railway Company under or in respect to said lease.

Dated, May 15, 1884, New York.

(Signed.) T. JEFFERSON COOLIDGE,
Prest. Oregon R'w. and N. Co.

EDMUND ROBERTSON,
Attorney in fact for the Oregonian Railway Company (Limited).

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM.

THE OREGON RAILWAY AND NAVIGATION COMPANY,
Plaintiff in Error,

vs.

THE OREGONIAN RAILWAY COMPANY (LIMITED),
Defendant in Error.

AFFIDAVIT OF C. J. SMITH, COMPTROLLER OF THE OREGON RAILWAY AND NAVIGATION COMPANY, PLAINTIFF IN ERROR.

I, C. J. SMITH, being first duly sworn, do say that I am the comptroller of the Oregon Railway and Navigation Company, plaintiff in error, which position I have held since prior to the making of the pretended lease upon which this action is brought. As such officer of the company I have audited all accounts for expenditures made by said company upon or on account of the railroad pretended to have been leased, during the time such road was operated by the said plaintiff in error. There was received by the plaintiff in error from the defendant in error to be expended upon said road the sum of $87,115. Said plaintiff expended in improvements and betterments upon said road during said time the sum of $116,411.16. In addition to the said expenditure the said plaintiff expended during the same time the further sum of $44,531.64 in the construction of warehouses to accommodate the business of said road.

C. J. SMITH.

Subscribed and sworn to before me, the undersigned, this 26th day of November, A. D. 1885,

[SEAL.] GEO. H. DURHAM,
Notary Public for Oregon.

SUPREME COURT OF THE UNITED STATES.

THE OREGON RAILWAY AND NAVIGATION COMPANY,
Plaintiff in Error,

AGST.

THE OREGONIAN RAILWAY COMPANY (LIMITED),
Defendant.

Southern District of New York, ss.:

ELIJAH SMITH, of the City of New York, being duly sworn, says:

I am the President of the Oregon Railway and Navigation Company, the plaintiff in error herein, and have been such President since the 17th day of July, 1884, and the Chairman of its Executive Committee.

Upon becoming such President, I learned that the Navigation Company had declined to perform any of the alleged covenants on its part, contained in an alleged lease of the Oregonian Railroad in Oregon, executed by the Oregonian Company (Limited), to the Oregon Railway and Navigation Company, upon the ground that said lease was wholly void at law. I learned that legal opinions to that effect had been given to the Navigation Company by several well known and competent counsel, and I believed such opinions to be correct, and that such belief has been shared by the other members of the Board of Directors of the Navigation Company. It seemed to me to be plainly my duty, and the duty of said board, to continue the same course of action in reference to said lease which had been resolved upon by my predecessor, Mr. T. Jefferson Coolidge, as President of the company.

The suit of the Oregonian Company against the Navigation Company, to recover rent under the said lease, has been defended solely with the view of asserting and protecting the rights and interests of the Navigation Company with as little loss and damage to the Oregonian Company as was possible. I further say that there has been no time during my presidency of the Navigation Company that any proposition on the part of the Oregonian Company to take possession of their road and operate it, without any prejudice whatever to their rights under the alleged lease, as they should eventually be determined to be, would not have been promptly accepted by the said Navigation Company.

I have read the affidavits of Edmund Robertson and Thomas Thornton contained in the printed papers upon the motion of the Oregonian Company herein, and I say that each and every statement, or suggestion, to the effect that the defense made by the Navigation Company in this action against the claim of the Oregonian Company for rent, is not a *bona fide* defense, or that it is a conspiracy, or in pursuance of any conspiracy to defeat the rights of the Oregonian Company, are wholly false.

In respect to the statement in the affidavit of the said Robertson that the Navigation Company has been, and still is, engaged in negotiating for the lease of its own railroad in Oregon to another company, I say that it is true that negotiations looking to such an object had been pending prior to the month of September last for a considerable period of time, and that such negotiations were conducted by myself, principally, on the part of the Navigation company ; but that they were at all times subject to the contingency that the lease either should be, or in some manner be made to be, valid in law. That in the summer of the present year the parties to such negotiations were so far agreed upon the terms of it as to enable the matter to be submitted to counsel for an opinion as to the validity of such a transaction, and that on the part of the Navigation Company I submitted the results of such negotiations to James C. Carter, Esq., of New York, counsel for said company, for his opinion thereon, and was advised by him in writ-

ing that such a contemplated lease would be absolutely invalid in law, for want of corporate power upon the part of said company to make such a lease. I was also informed at that time that this opinion was concurred in by Sidney Bartlett, Esq., of the Boston bar, as counsel for the Union Pacific Railroad Company, one of the proposed lessees. Upon receiving this opinion from the counsel of this company, the negotiations for a lease were promptly abandoned, and the same counsel was instructed to draw a project for a proposed traffic agreement which should not be subject to the objection presented by the proposed lease —that the Navigation Company had no power to make it —and which should yet accomplish all, or most, of the objects contemplated by such lease; and that the negotiations between the several companies, so far as they have since continued, have been confined to such projected traffic agreement.

ELIJAH SMITH.

Sworn to before me, this 3d day of Decemer, 1885,

LAWRENCE KNEELAND,
Notary Public,
Kings Co.

[SEAL.]

Cert. filed in N. Y. Co.

SUPREME COURT OF THE UNITED STATES.

THE OREGON RAILWAY AND NAVIGATION COMPANY, Plff. in Error,

vs.

THE OREGONIAN RAILWAY COMPANY (LIMITED).

Southern District of New York, ss.:

ELIJAH SMITH, residing in said district, being duly sworn, says: The statement of Mr. Edmond Robertson, in his affidavit herein, to the effect that Mr. James C. Carter was or is the attorney of the Oregon Railway and Navigation Company, either in this action or otherwise, or that he submitted a brief in this cause in the Court below, is incorrect. Mr. Carter has been counsel for said company, and as such counsel furnished an opinion to the company concerning the validity of the lease of the Oregonian road before this action was begun in the Court below. This opinion, as deponent believes, was submitted to the Court below.

ELIJAH SMITH.

Sworn to before me, a Notary Public, this 4th day of December, 1885,

ARTHUR BELL,
Notary Public,
Kings County.

[SEAL.]

Certificate on file in New York County.

Office Supreme Court U. S.
FILED
APR 30 1888
JAMES H. McKENNEY
Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1887.

THE OREGON RAILWAY AND NAVIGATION COMPANY, Plaintiff in Error,

vs.

THE OREGONIAN RAILWAY COMPANY, LIMITED, Defendant in Error,

Copy of Constitution and Laws Referred to by Defendant in Error.

Copy of Sections of "British Companies Act of 1862" Referred to in the Record.

THOMAS McGILL & CO., LAW PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

October Term 1887.

THE OREGON RAILWAY AND NAVIGATION COMPANY, Plaintiff in Error,
vs.
THE OREGONIAN RAILWAY COMPANY, LIMITED, Defendant in Error.

No. 275.

Copy of Constitution and Laws Referred to by Defendant in Error.

Copy of Sections of "British Companies Act of 1862" Referred to in the Record.

SECTION VI.

Any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this act in respect of registration, form an incorporated company, with or without limited liability.

SECTION VIII.

Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a com-

pany limited by shares, the memorandum of association shall contain the following things (that is to say):

(1) The name of the proposed company, with the addition of the word "limited" as the last word in such name:

(2) The part of the United Kingdom, whether *England*, *Scotland*, or *Ireland*, in which the registered office of the company is proposed to be situate:

(3) The objects for which the proposed company is to be established:

(4) A declaration that the liability of the members is limited:

(5) The amount of capital with which the company proposes to be registered divided into shares of a certain fixed amount:

Subject to the following regulations:

(1) That no subscriber shall take less than one share:

(2) That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes.

Section IX.

Where a company is formed on the principle of having the liability of its members limited to such amount as the members respectively undertake to contribute to the assets of the company in the event of the same being wound up, hereinafter referred to as a company limited by guarantee, the memorandum of association shall contain the following things: (that is to say),

(1) The name of the proposed company, with the addition of the word "limited" as the last word in such name:

(2) The part of the United Kingdom, whether *England*, *Scotland*, or *Ireland*, in which the registered office of the company is proposed to be situate:

(3) The objects for which the proposed company is to be established:

(4) A declaration that each member undertakes to contribute to the assets of the company in the event of the same being wound up, during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges, and expenses of winding up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount.

SECTION XI.

The memorandum of association shall bear the same stamp as if it were a deed, and shall be signed by each subscriber in the presence of, and to be attested by, one witness at the least, and that attestation shall be a sufficient attestation in *Scotland*, as well as in *England* and *Ireland*: It shall, when registered, bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in the memorandum contained, on the part of himself, his heirs, executors, and administrators, a covenant to observe all the conditions of such memorandum, subject to the provisions of this act.

Articles of Association.

SECTION XIV.

The memorandum of association may, in the case of a company limited by shares, and shall, in the case of a company limited by guarantee or unlimited, be accompanied, when registered, by articles of association signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient: The articles shall be expressed

in separate paragraphs, numbered arithmetically: They may adopt all or any of the provisions contained in the table marked A in the first schedule hereto: They shall, in case of a company, whether limited by guarantee or unlimited, that has a capital divided into shares, state the amount of capital with which the company proposes to be registered; and in the case of a company, whether limited by guarantee or unlimited, that has not a capital divided into shares, state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration: In a company limited by guarantee or unlimited, and having a capital divided into shares, each subscriber shall take one share at the least, and shall write opposite to his name in the memorandum of association the number of shares he takes.

Section XVI.

The articles of association shall be printed, they shall bear the same stamp as if they were contained in a deed, and shall be signed by each subscriber in the presence of, and be attested by, one witness at the least, and such attestation shall be a sufficient attestation in *Scotland* as well as in *England* and *Ireland:* When registered, they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this act; and all moneys payable by any member to the company, in pursuance of the conditions and regulations of the company, or any of such conditions or regulations, shall be deemed to be a debt due from such member to the company,

and in *England* and *Ireland* to be in the nature of a specialty debt.

General Provisions.

SECTION XVII.

The memorandum of association and the articles of association, if any, shall be delivered to the registrar of joint stock companies hereinafter mentioned, who shall retain and register the same: There shall be paid to the registrar by a company having a capital divided into shares, in respect of the several matters mentioned in the table marked B in the first schedule hereto, the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct; and by a company not having a capital divided into shares in respect of the several matters mentioned in the table marked C in the first schedule hereto, the several fees therein specified, or such smaller fees as the Board of Trade may from time to time direct: All fees paid to the said registrar in pursuance of this act shall be paid into the receipt of Her Majesty's Exchequer, and be carried to the account of the consolidated fund of the United Kingdom of *Great Britain* and *Ireland.*

SECTION XVIII.

Upon the registration of the memorandum of association and of the articles of association in cases where articles of association are required by this act or by the desire of the parties to be registered, the registrar shall certify under his hand that the company is incorporated, and in the case of a limited company that the company is limited: the subscribers of the memorandum of association, together with such other persons as may from time to time become members of the company, shall thereupon be a body corporate by the name contained in the memorandum of association, capable

forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands, but with such liability on the part of the members to contribute to the assets of the company in the event of the same being wound up as is hereinafter mentioned: A certificate of the incorporation of any company given by the registrar shall be conclusive evidence that all the requisitions of this act in respect of registration have been complied with.

The following in the same act appears in the first schedule of the act, but I am not sure that it is stated in the record and as a part of the act in question; and if it is not, perhaps as a matter of foreign law it cannot be properly referred to.

Items 52, 53, and 55 in the schedules are as follows:

Directors.

(52) The number of the directors, and the names of the first directors, shall be determined by the subscribers of the memorandum of association.

(53) Until directors are appointed the subscribers of the memorandum of association shall be deemed to be directors.

Powers of Directors.

(55) The business of the company shall be managed by the directors, who may pay all expenses incurred in getting up and registering the company, and may exercise all such powers of the company as are not by the foregoing act, or by these articles, required to be exercised by the company in general meeting, subject

nevertheless to any regulations of these articles, to the provisions of the foregoing act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.

CONSTITUTION OF OREGON, ARTICLE XI, SECTION 2.

Corporations may be formed under general laws, but shall not be created by special laws, except for municipal purposes. All laws passed pursuant to this section may be altered, amended, or repealed, but not so as to impair or destroy any vested corporate rights.

Deady & Lane's Laws of Oregon, 1874. (*P. 524, et seq.*)

SECTION 1.

Whenever three or more persons shall desire to incorporate themselves, for the purpose of engaging in any lawful enterprise, business, pursuit, or occupation, they may do so in the manner provided in this act.

SECTION 2.

Such persons shall make and subscribe written articles of incorporation in triplicate, and acknowledge the same before any officer authorized to take the acknowledgment of a deed, and file one of such articles in the office of the Secretary of State, another with the clerk of the county where the enterprise, business, pursuit, or occupation is proposed to be carried on, or the prin-

cipal office or place of business is proposed to be located, and retain the third in the possession of the corporation.

SECTION 3.

The articles of incorporation, or a certified copy of the one filed with the Secretary of State or the county clerk, is evidence of the existence of such corporation.

SECTION 4.

The articles of incorporation shall specify:

1. The name assumed by the corporation, and by which it shall be known; and the duration of the corporation, if limited;

2. The enterprise, business, pursuit, or occupation in which the corporation proposes to engage;

3. The place where the corporation proposes to have its principal office or place of business;

4. The amount of the capital stock of the corporation;

5. The amount of each share of such capital stock;

6. If the corporation is formed for the purpose of navigating any stream or other water, or making or constructing any railway, macadamized road, plank road, clay road, canal or bridge, the termini of such navigation, road, canal, or the site of such bridge.

SECTION 5.

Upon making and filing the articles of incorporation, as herein provided, the persons subscribing the same are incorporators, *and authorized to carry into effect the objects specified in the articles*, in the manner provided in this chapter; and they and their successors, associates, and *assigns*, by the name assumed in such articles, shall thereafter be deemed a body corporate with power:

1. To sue and be sued;

2. To contract and be contracted with;

3. To have and use a corporate seal, and the same to alter at pleasure;

4. To purchase, possess, and dispose of such real and personal property as may be necessary and convenient to carry into effect the objects of the incorporation;

5. To appoint such subordinate officers and agents as the business of the corporation may require, and prescribe their duties and compensation;

6. To make by-laws, not inconsistent with any existing law, for the sale of any portion of its stock for delinquent or unpaid assessments due thereon, which sale may be made without judgment or execution: *Provided*, That no such sale shall be made without thirty days' notice of time and place of sale, in some newspaper in circulation in the neighborhood of such company, for the transfer of its stock, for the management of its property, and for the general regulation of its affairs.

SECTION 9.

* * * * * * *

From the first meeting of the directors, the powers vested in the corporation are exercised by them, or by their officers or agents, except as otherwise specially provided in this chapter.

SECTION 11.

* * * * * * *

The powers vested in the directors may be exercised by a majority of them, and any less number may constitute a quorum at all regular or stated meetings authorized by the by-laws of the corporation in all cases when either the directors or incorporators shall have filed with the Secretary of State and county clerk a written statement designating such less number sufficient to form a quorum.

* * * * * * *

SECTION 19.

Any corporation organized under the provisions of this chapter, may, at any meeting of the stockholders, which is called for such purpose, by a vote of the majority of the stock of such corporation, increase or diminish its capital stock or the amount of the shares thereof, *or authorize the dissolution of such corporation*, and *the settling of its business*, and *disposing of its property*, and dividing its capital stock in any manner it may see proper.

SECTION 20.

Any corporation formed for the purpose of navigating any stream or other water, may, by virtue of such incorporation, construct any railway, macadamized road, plank road or clay road, or canal or bridge, necessary and convenient for the purpose of transporting freight or passengers across any portages on the line of such navigation, occasioned by any rapids or other obstructions to the navigation of such stream or other water, in like manner and with like effect as if such corporation had been specially formed for such purposes; but no corporation formed under this chapter, or heretofore or hereafter incorporated by any special act of incorporation, passed by the legislative assembly of this State or otherwise, for the purpose of navigating any stream or other water of this State, or forming the boundary thereof in whole or in part, nor any stockholders in such corporation, shall even take or hold stock, or any interest, directly or indirectly, in the stock of any incorporation which may be formed under this chapter, for the purpose of building or constructing any road in this chapter mentioned; *nor shall any such corporation ever purchase, lease, or in any way control such road or the corporate rights of such last-named corpora-*

tion: Provided, further, That corporations heretofore incorporated, or which may hereafter be formed under this chapter for the purpose of establishing and keeping a ferry across any stream or other water of this State, or forming the boundary thereof, in whole or in part, shall not be deemed a corporation for the purpose of navigating such stream or water, within the meaning of this chapter, nor shall the stockholders thereof be restrained from taking or holding stock in a corporation formed under this chapter for the purpose of constructing or building any road.

Act of 18th October, 1878, to Amend Section 20, last Quoted.

Be it enacted by the Legislative Assembly of the State of Oregon:

Section 1.

That section 20, of title 1, of chapter 7, of said code be amended so as to read as follows:

Section 20.

Any corporation formed for the purpose of navigating any stream or other water, may, by virtue of such incorporation, construct any railway, macadamized road, plank road, or clay road, or canal, or bridge necessary or convenient for the purpose of transporting freight or passengers across any portage on the line of such navigation, occasioned by any rapids or other obstructions to the navigation of such stream, or other water, in like manner, and with like effect, as if such corporation had been formed for such purpose.

Approved 18 October, 1878.

Laws of Oregon, 1878, p. 59.

An Act to Authorize Foreign Incorporations to do Business and Exercise their Corporate Powers within the State of Oregon.

Be it enacted by the Legislative Assembly of the State of Oregon:

Section 1.

That any foreign incorporation incorporated for the purpose of constructing, or constructing and operating, or for the purpose of or with the power of acquiring and operating any railway, macadamized road, plank road, clay road, canal or bridge, or for the purpose of conducting water, gas or other substance, by means of pipes laid under ground, shall, on compliance with the laws of this State for the regulation of foreign corporations transacting business therein, have the same rights, powers and privileges in the exercise of the rights of eminent domain, collection of tolls, and other prerogative franchises as are given by the laws of this State to corporations organized within this State, for the purpose of constructing any railway, macadamized road, plank road, clay road, canal or bridge, or for the purpose of conducting water by means of pipes laid under the surface of the ground.

Section 2.

Nothing in this act contained shall be so construed as to give to any foreign corporation or corporations, any other or further rights, powers, or privileges than may be acquired or exercised by corporations incorporated under the laws of this State; but only so as to give to foreign corporations the same rights, powers, and privileges, on a compliance with the laws of this State, as

may be acquired or exercised by corporations incorporated under the laws of this State.

Approved October 21, 1878.

Laws of Oregon, 1878, pp. 95, 96.

ACT OF 22D OCTOBER, 1880, ENTITLED AN ACT TO GRANT THE OREGONIAN RAILWAY COMPANY, LIMITED, THE RIGHT OF WAY AND STATION GROUNDS OVER THE STATE LANDS, AND TERMINAL FACILITIES UPON THE PUBLIC GROUNDS AT THE CITY OF PORTLAND.

* * * * * * *

Whereas, the Oregonian Railway Company, Limited, is now engaged in the construction of a system of railways in the State of Oregon, from the city of Portland, the most-used shipping port of this State, to the head of the Willamette Valley, and to a connection with the system of railroads having a connection with those States and Territories of the United States situate east of the Rocky Mountains, and the building of the railway of said company will be of great benefit and lasting advantage to the people of this State:

* * * * * * *

Now, therefore,

Be it enacted, &c., That there by [be] and is hereby granted to the Oregonian Railway Company, Limited, a corporation at this time engaged in the construction and operation of a railway in the State of Oregon, and to its assigns, the owners and operators of the railway now being constructed by it, and for the use of said railway, in the construction, use, and operation thereof, the rights, privileges, easements, and property following, that is to say:

SECTION 1.

Those certain premises situate in the city of Portland, in the State of Oregon, and commonly known as the public levee, &c.

* * * * * * *

Provided, always, That the said Oregonian Railway Company, Limited, or its assigns, shall have no power to sell, convey, or assign the premises or rights hereby granted, or any part or parcel thereof, to any person, persons, firm or corporation, save only with and as a part and parcel of, and as appurtenant to, the railway now built and owned by said company, and now in process [of] construction by it;

* * * * * * *

Laws of Oregon, 1880, pp. 57–8.

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JAMES H. McKENNEY.

Public Statutes of Oregon Recognizing the Assignability of Railroads.

In addition to the Oregonian Railway Company's Act of 22 Oct., 1882, there are the following:

1. *The Oregon Railway and Navigation Co.'s Act—Oregon Statutes, 25 Oct., 1880—*

Recites that "the O. R. & N. Co. was duly incorporated on July 12, 1879, for the purpose, among other things, of," &c.

SECTION 1.

That there be and there is hereby granted to the said O. R. & N. Co., its *successors and assigns*, the right of way through any and all lands belonging to the State of Oregon, &c.

SECTION 2.

Whenever said company, *its successors or assigns*, shall file, &c.

2. *Statutes of Oregon for 1880, p. 55—Astoria and Winnemucca Railroad Co.'s Act.*

SECTION 1.

That there be and is hereby granted to the A. & W. R. R. Co., *and its assigns*, the right of way, &c.

SECTION 4.

That the said company shall have the right, and *it*

and its assigns are hereby authorized to construct bridges, &c.

3.—*Oregon Statutes, 1878—Portland Bridge Co.'s Act.*

SECTION 1.

That it shall be lawful for the Portland Bridge Co., a corporation duly incorporated under and in conformity with the law of Oregon, or *its assigns*, and that said corporation or *its assigns* be and are hereby authorized and empowered to construct, build, &c.

4.—*Statutes of 1882—Oregon Short-Line Railway Co.'s Act—17 Oct.*

SECTION 1.

That there be and hereby is granted the said O. S. L. R. Co., and *its successors or assigns*, the right of way, &c.

5.—*Statutes of 1872—Portland, Dalles and Salt Lake R. R. Co.'s Act—15 Oct.*

SECTION 1.

Grants proceeds of land sales.

SECTION 2.

Grants rights of way.

SECTION 11.

The rights and privileges of this company, hereby granted, shall not be assignable to any other company without the assent of the Legislature.

6.—*Statutes of 1874—Oregon Central Pacific Railway and Telegraph Line—24 Oct., 1874.*

SECTION 1.

That there be and is hereby granted to the Oregon Central Pacific Company *and its assigns* the right of way through any lands belonging to the State of Oregon, &c.

The following act is posterior to the litigation in this case, viz., "*An act to provide for the completion of the narrow-guage system.*" (24 *Ib.*, 1885.)

It recites the Oregonian Railway Co.'s Act of 22 Oct., 1882, and proceeds:

Whereas, said Oregonian Railway Company, Limited, did, on the 1st day of August, 1881, then lease its constructed lines of railway in the Willamette Valley to the Oregon Railway and Navigation Company for the period of ninety-six years, &c.

and its assigns are hereby authorized to construct bridges, &c.

3.—*Oregon Statutes, 1878—Portland Bridge Co.'s Act.*

SECTION 1.

That it shall be lawful for the Portland Bridge Co., a corporation duly incorporated under and in conformity with the law of Oregon, or *its assigns*, and that said corporation or *its assigns* be and are hereby authorized and empowered to construct, build, &c.

4.—*Statutes of 1882—Oregon Short-Line Railway Co.'s Act—17 Oct.*

SECTION 1.

That there be and hereby is granted the said O. S. L. R. Co., and *its successors or assigns*, the right of way, &c.

5.—*Statutes of 1872—Portland, Dalles and Salt Lake R. R. Co.'s Act—15 Oct.*

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DISCREPANCY IN PAGINATION

Or

PAGES MISSING

And

CANNOT BE FOUND

NOTE.—The three briefs submitted by the appellant practically abandon everything except the contention that the plaintiff had no power to *make* the lease. They then infer, without attempting directly to prove, that the defendant must also be without power to *take* the lease.

Mr. Carter's brief (p. 37) appears to admit that section 5 of the Oregon Corporation Code *does* give a company capacity to carry into effect the objects specified in the articles, and that "any lawful enterprise, business, pursuit, or occupation" means, as Judge Deady says, "any which is *not prohibited by law.*" In other words, both the Oregonian Co. and the O. R. & N. Co. acquired "*corporate capacity*" to make and take a lease respectively. This admission ought to end the controversy. Mr. Carter seeks to discriminate between such *corporate capacity* and what he calls *substantial rights*, but the distinction is in itself unintelligible and wholly unsupported by a scintilla of authority.

The following section of the Corporation Law, alluded to in the brief for respondent, (p. 16,) throws further light on the meaning of "lawful enterprise," &c.:

"The directors of any corporation may file supplementary articles of incorporation at any time when a three-fourths vote of all the stock subscribed shall so determine, for the purpose of engaging in *any business corporate or germane to the original objects, or primary purpose* of said corporation *not in violation of law*, or at any time when a seven-eighths vote of all the stock subscribed shall so determine for the purpose of engaging in *any new enterprise or pursuit not in violation of law*," &c.

Observe the comprehensive character of the language used: *Enterprise*, *business*, *pursuit*, *occupation*, *object*, *purpose*. Anything that comes within any of these words, if embraced in articles, becomes a thing which

the corporation is entitled to do, provided only it is in itself "lawful"—*i. e.*, not "in violation of law."

Mr. Dolph's argument that leasing does not come within these words is not consistent with Mr. Carter's admission or with the ordinary use of language. To build a house, a factory, or a railroad for the purpose of letting and receiving rent therefor—how can it be argued that that is not an enterprise, business, purpose, &c.?

Attention may be called to Mr. Bartlett's solitary and remarkable attempt (Brief, p. 7) to explain away section 20 of the Corporation Act as amended by the law of 18th October, 1878. He says the original prohibition indicates the *fact* or the *fear*—(1) that navigation companies, *and these only*, had power to lease railroads; or (2) that corporations heretofore or hereafter formed by any special act of incorporation might have clauses in their charters allowing them to make such leases!

Mr. Dolph's argument that the Oregonian Railway Company Act of 1880 is unconstitutional was abandoned in the court below, and is met by the case of Wallace *v.* Loomis (97 U. S. Reports, 146) and Southern Pacific Co. *v.* Orton, in 6 Sawyer.

This act is not confined to granting terminal property. It also grants rights of way on State lands to the O. R. Co. *and its assigns.*

As to its effect, Mr. Dolph's argument that the *assigns* must be those taking on dissolution is unsupported by any sort of authority. Attention may be called here to the numerous similar acts, granting similar privileges on similar terms to *probably every railroad in Oregon.* In some cases the assigns taking on dissolution appear to be specially indicated by the word *successors.*

The Foreign Corporations Act of 1878 has also been minimized by the appellants. Its object, as declared by its title, is to "enable foreign corporations to exercise

their corporate powers in Oregon," and section 2 places them expressly on the same footing as domestic corporations.

As to the case of Lakin *v.* R. R. Co., 13 Oregon, it is difficult to see why so much stress should have been laid on it. It merely affirms the doctrine of this court in R. R. *v.* Thomas, which the respondents certainly entirely accept, and of which they claim the benefit. But the following observations are to be made about it: (*a.*) The decision was rendered long after the decision of Judge Deady in this case; and if it were contrary to that decision, it would not bind this court as to the law governing this case. (See Burgess *v.* Seligman, 107 U. S., 20.) (*b.*) If it was intended to overrule Judge Deady's decision, why was that decision never adverted to? The silence of the court is conclusive that they believed, as we do, their decision to be entirely in harmony with Judge Deady's. (*c.*) The whole of the opinion is *obiter dictum*, so far as it relates to lease. There was no lease in the case, and the remarks of the court as to what would have happened if there had been a lease are purely *obiter dicta.*

The recent Oregon acts set out in Mr. Dolph's brief were passed subsequently to the decision of Judge Deady in this case, and are therefore irrelevant. It may be pointed out, however, that they are in no way inconsistent, even in implication, with the law as laid down by that learned judge. And as a matter of curiosity it may be noted that these statutes, equally with the pre-existing law, would, on Mr. Carter's theory, before mentioned, fail to give anything but "*corporate capacity.*" Even they do not give *substantial rights!*

The British Companies Act, 1862, has been misconceived by the appellants. (Mr. Bartlett's brief, pp. 5, 6, and Mr. Carter's, p. 8.) Domestic railway companies do not organize under it because there is no law

giving *compulsory* powers to any corporation, and recourse must therefore be had to Parliament by companies wanting such powers. (3 L. R. Irish, .)

Mr. Carter's statement (Brief, p. 9) that the Oregon Foreign Corporations Act was designed to enforce *restrictions*, by requiring compliance with certain conditions, is misleading. The restrictions referred to are confined to a special class of corporations, and have no relation to corporations in general or railway companies in particular. This has been long settled. (See opinion by Judge Deady in this case, Record, p. 80.)